TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1921

No. [redacted] 207

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, APPELLANT,

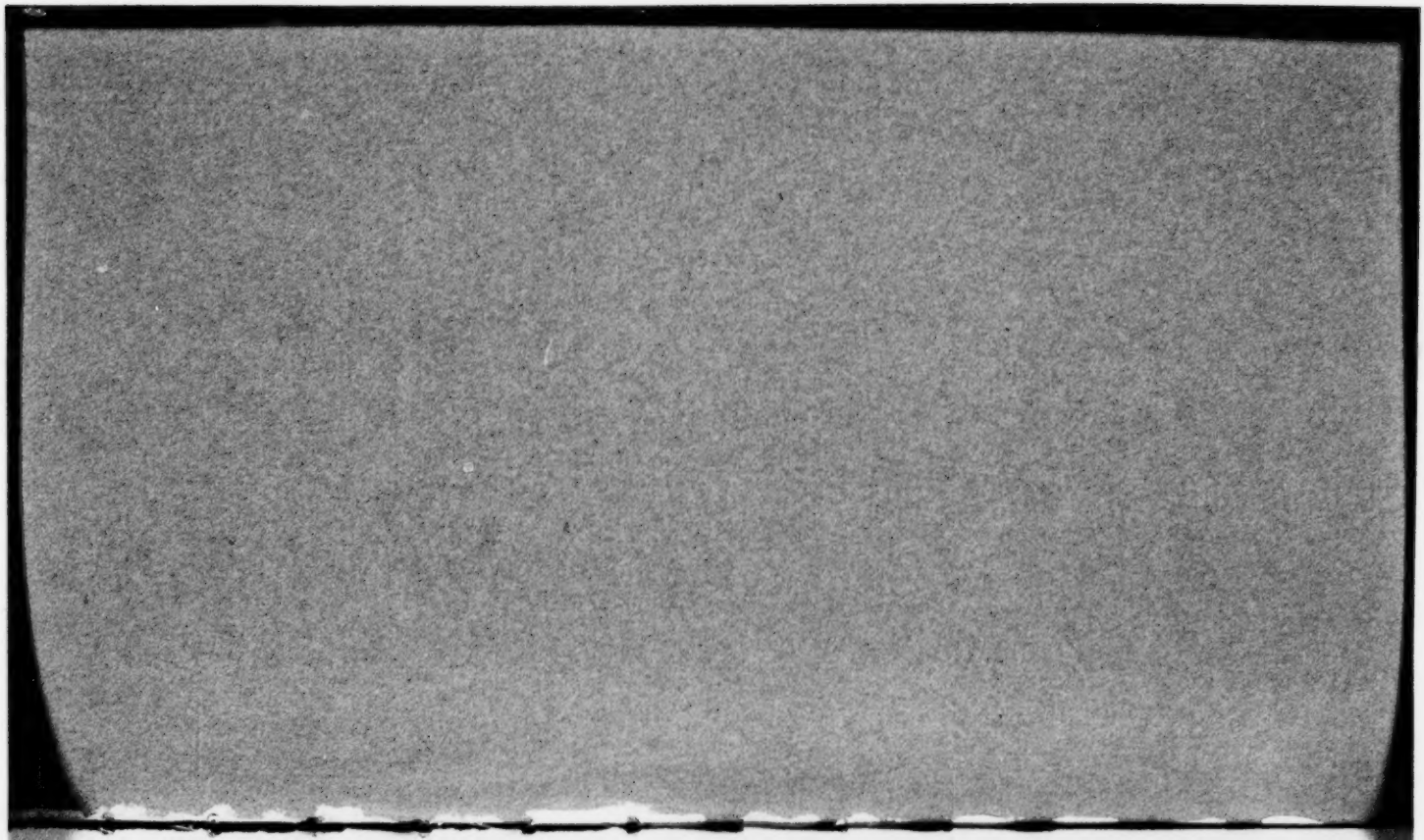
vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JANUARY 24, 1921.

(28,055)



(28,055)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 698.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 7, 1921.

1 Court of Claims.

No. 33976.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND

vs.

THE UNITED STATES.

I. *History of Proceedings.*

On July 25, 1918, the claimant filed its original petition.

On November 26, 1918, by leave of court, the defendant filed a demurrer to claimant's petition.

On December 16, 1919, the demurrer was argued and submitted.

On January 13, 1919, the court filed an order overruling defendant's demurrer without prejudice, and allowing claimant sixty (60) days within which to file certain papers.

On March 10, 1919, the claimant filed its amended petition, and Exhibit "A," which are as follows:

II. *Amended Petition and Exhibit "A."*

Filed March 10, 1919.

To the Honorable the Chief Justice and the judges of the Court of Claims:

The claimant, the Fidelity and Deposit Company of Maryland, a corporation duly created and organized under the laws of the Commonwealth of Maryland, *and* by leave of this Honorable Court under its order dated January 13, 1919 (October Term, 1918), files this its amended petition in the above entitled cause, and shows the Court as follows:

I.

2 The claimant, the Fidelity and Deposit Company of Maryland, is a corporation duly created and existing under the laws of the Commonwealth of Maryland, (having its principal office in the City of Baltimore, in the Commonwealth of Maryland), having been incorporated on or about the 15th day of February, A. D. 1890, its charter having been granted by Art. 23 of the Code of Public General Laws of Maryland entitled "Corporations," and amended by the special Acts of the Legislature of the State of Maryland approved April 3, 1890 (chapter 263 of the laws of Maryland, 1890); April 6, 1894 (chapter 330 of the laws of Maryland, 1894); April 7, 1898 (chapter 358 of the laws of Maryland, 1898); April 7, 1900 (chapter 5360 of the laws of Maryland, 1900), and April 11, 1910 (chapter 643 of the laws of Maryland, 1910), as shown by a

certified copy of its charter, marked claimant's "Exhibit A," obtained under the above mentioned laws, hereto attached and prayed to be read and considered a part of this petition:

That the aforesaid claimant has been continuously since the above date (February 15, 1890), acting and doing business as a corporation created and existing under the laws of the Commonwealth of Maryland, as aforesaid, up to and including the present date.

II.

That this claimant by reason of the power and authority conferred upon it by its charter and amendments thereto, as shown by the said certified copy of the charter hereinbefore referred to and marked claimant's "Exhibit A," was authorized and empowered to carry on the following classes of business covering the period from July 1, 1898, to June 30, 1902, viz.:

To receive money and other personal property in trust for safe-keeping or storage, or otherwise—to accept and execute trusts of every description as natural persons may—to buy, sell, con-
3 vey, develop, improve and deal in real estate—to invest and re-invest such trust funds as may be entrusted to them, and to change such investments at its pleasure—and to receive money as may be agreed upon between it and the persons making such deposits—to act as agent for the purpose of issuing, registering or countersigning certificates of stocks, bonds or other evidences of debt of any State, corporation, association, municipality or public authority, on such terms as may be agreed upon—to deal in exchange foreign and domestic and in every and all description of properties, personal effects, securities, mortgages, land, certificates of indebtedness, stocks of incorporated companies, rates, loans on bonds of the United States, or of any city, county, or municipality, or of any incorporated company or any individual—and to insure the fidelity of persons holding places of trust or responsibility in, to or under any State, county, city, corporation, company, person or persons whatsoever—to become security for the faithful performance of any trust, office, duty, contract of agreement and to supersede any judgment, or to go upon any appeal or other bond—and to guarantee, endorse and secure payment and punctual performance and collection of notes, debts, bills of exchange contracts, bonds, accounts, clauses, rents, annuities, mortgages, choses in action, evidences of debt, certificates of property or value, checks and titles to property, indebtedness of individuals, of companies, partnerships, contracts, loans of States, cities, counties, and municipalities on such terms and commissions as may be agreed upon or established by claimant and the parties dealing therewith.

That the principal business of the claimant (almost exclusively so) covering the period from June 13, 1898, to July 1, 1902, inclusive, was that of "acting either solely or jointly as surety or sureties, to insure and become surety for the fidelity of persons holding places of trust or responsibility, public or private, in, to or under
4 the United States Government and in, to or under any foreign government and to become surety either solely or jointly with

one or more other sureties for the faithful performance of any trust, office, duty or contract, to be discharged or performed in any jurisdictions aforesaid and to sign, make, and execute bail, bonds, and recognizances and generally to act as surety for the faithful appearance and surrender of individuals," otherwise known as the "general surety and bonding business," throughout the United States and its territories, having its principal or home office in the city of Baltimore, in the State of Maryland.

III.

That your petitioner is advised, after diligent search up to and including the year 1902, that no statutes of the Commonwealth of Maryland relating to the subject of banking or trust companies so far as they relate to a definition of either, can be found.

IV.

On or about the 13th day of June, 1898, the President of the United States, approved an Act, entitled "An Act to provide ways and means to meet war expenditures and for other purposes" (30 Stat., 448), section 2 of said Act reading as follows:

"That from and after July 1, 1898, a special tax shall be, and hereby is, imposed annually as follows, that is to say:

Bankers using or employing a capital not exceeding the sum of twenty-five thousand dollars ($25,000) shall pay fifty dollars ($50); when using or employing a capital exceeding twenty-five thousand dollars ($25,000) for every additional thousand dollars in excess of twenty-five thousand dollars ($25,000) two dollars ($2), and in estimating capital, surplus shall be included. The amount of such annual tax shall in all cases be computed on the basis of the capital and surplus for the preceding fiscal year.

Every person, firm, or company, and every incorporated or other bank, having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or sale, shall be a banker under this Act; Provided, That any savings bank having no capital stock, and whose business is confined to receiving deposits and loaning or investing the same for the benefit of its depositors and which does no other business of banking, shall not be subject to this tax."

These provisions were amended by 31 Stat., 938, in respect not material to the present case.

V.

By the Act of April 12, 1902 (32 Stat., 96, 97), Section 2 of the Act of June 13, 1898, above referred to, together with all amendments thereto, was repealed to take effect July 1, 1902.

VI.

On July 27, 1912, the President approved another Act entitled "An Act extending the time for the repayment of certain War Revenue taxes erroneously collected (37 Stat., 240)." Said Act reads as follows:

"That all claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected under the provisions of section 29 of the Act of Congress approved June 13,
6 1898, known as the war-revenue tax, or of any sums alleged to have been excessive or in any manner wrongfully collected under the provisions of said Act, may be presented to the Commissioner of Internal Revenue on or before the first day of January, 1914, and not thereafter.

Sec. 2. That the Secretary of the Treasury is hereby authorized and directed to pay, out of any moneys of the United States not otherwise appropriated to such claimants as have presented or shall hereafter present their claims and shall establish such erroneous and illegal assessment and collection, any sums paid by them or on their account or in their interest to the United States under the provision of the Act aforesaid."

VII.

That on or about the 4th day of August, 1898, the 9th day of August, 1899, the 26th day of July, 1900, and the 31st day of July, 1901, the Collector of Internal Revenue in the city of Baltimore, as aforesaid, acting for and on behalf of the United States and assuming to act as such and under section 2 of the Act of Congress approved June 13, 1898, assessed and collected from your petitioner as a Special Bankers' Tax sums aggregating the sum of eight thousand, three hundred dollars ($8,300), the tax aforesaid being assessed as a Special Bankers' Tax upon the following basis, viz:

Capital as arbitrarily assumed by the Collector of Internal Revenue to have been used or employed by the claimant in the business of a banker under Section 2 of the War Revenue Act of 1898 aforesaid:

For the fiscal year ending June 30, 1898, twenty-five thousand dollars ($2,500) at two dollars per thousand.....	$50
For the year ending June 30, 1899, one million one hundred twenty-five thousand dollars ($1,125,000).....	2,250
7 For the year ending June 30, 1900, one million five hundred thousand dollars ($1,500,000).....	3,000
For the year ending June 30, 1901, one million five hundred thousand dollars ($1,500,000).....	3,000
Total tax on capital	$8,300

as shown by the records of the office of the Commissioner of Internal Revenue, Treasury Department, hereby referred to and prayed to

be considered a part of this petition, consisting of the assessment returns, records of payments, and receipts of the Collector of Internal Revenue, which are hereby referred to and prayed to be considered a part hereof.

VIII.

That no part of the capital or surplus of this claimant was used or employed as a banker or in the banking business within the meaning of Section 2 of the War Revenue Act of June 13, 1898, aforesaid. To the contrary, the entire capital and surplus of the claimant company was permanently invested in stocks, bonds, and other securities covering the entire taxing period, and the use of the aforesaid capital and surplus of the claimant company was confined entirely to the Surety Department, or business of this claimant, other than as a banker or in the banking business, covering the entire taxing period, from July 1, 1898, to June 30, 1902.

IX.

That on or about the 22d day of November, 1913, your petitioner, by its attorneys, duly filed an application in the Treasury Department, under the Refunding Act of Congress of July 27, 1912, aforesaid, praying the refund of all of the said moneys, through the Collector of Internal Revenue located in the City of Balti-
8 more, in the State of Maryland, as aforesaid (which was the procedure required by the Treasury Department), who, in the regular course of his official business, certified the same to the Treasury Department for its consideration, as shown by the records of the office of the Commissioner of Internal Revenue of the Treasury Department, hereby referred to and prayed to be read and considered a part of this petition.

Said application was on Form 46 of the office of the Commissioner of Internal Revenue of the Treasury Department, as required, and was in all respects complete, regular, and in accordance with the law and regulations, and was accompanied by all the necessary evidence and proof of facts, the same consisting of a Power of Attorney of the claimant to Lyon and Lyon, as Attorneys, to make such claims; two receipts of the Collector of Internal Revenue of the District of Maryland, showing the payment of the taxes for the fiscal years ending 1898 and 1899, and the affidavit of the claimant showing the loss of two other receipts showing the payment of taxes for the fiscal years ending 1900 and 1901, and which, for that reason, could not be furnished; by another affidavit of the claimant showing that its capital and surplus covering the period from July 1, 1898, to June 30, 1902, upon which the tax was assessed and collected, was not used or employed in the banking business, but was permanently invested in stocks, bonds and other securities as hereinbefore stated during the entire taxing period from July 1, 1898, to June 30, 1902, and that any banking business done during this period was done entirely by means of the depositors' moneys, these being the reasons set forth by the claimant in the claim for refund to show the tax was

erroneous and illegal and refundable to it under the Act of July 27, 1912, aforesaid. The facts alleged in the said application were not traversed or denied by the Secretary of the Treasury, or by any representative of the United States. Although said application was in all respects complete and in due form, nevertheless, on or about the 19th day of April, 1917, the Secretary of the Treasury refused and denied the said application and has continuously denied, and still denies, and refuses to pay your petitioner the money asked for and demanded in its application as aforesaid, all of which facts being shown by the records of the office of the Commissioner of Internal Revenue of the Treasury Department, and being hereby referred to, are prayed to be read and considered a part of this petition.

9

X.

Your petitioner is advised by its counsel and therefore avers that the taxes collected from it are erroneous and illegal, which reasons were urged at the time the claim for refund was pending in the Treasury Department; and which are the same reasons urged here, viz.:

a. Because the entire amount of the said claimant's capital and surplus were, at the time said assessments were levied and during the entire taxing period from July 1, 1898, to June 30, 1902, permanently invested in stocks, bonds, securities and other property, and were not at any time from July 1, 1898, to June 30, 1902, nor any part thereof, used or employed in the banking business.

b. Because the entire capital and surplus of the claimant during the entire period of taxation aforesaid was confined to and used and employed exclusively by the claimant in its surety and bonding business, or business of the claimant other than as a banker or in the banking business, and was not used or employed as a banker or in the banking business within the meaning of Section 2 of the War Revenue Act of June 13, 1898.

c. Because the petitioner was not at the time the said assessments were levied and the payment of the taxes made, or at any time during the taxing period (from July 1, 1898, to June 30, 1902), a banker or engaged in the banking business within the meaning of the War Revenue Act of June 13, 1898.

10

That the moneys which were collected from your petitioner as taxes on its capital and surplus as being used or employed in the banking business aforesaid are refundable to it under the terms and provisions of the Refunding Act of July 27, 1912, as hereinbefore set forth, and that the refusal of the Secretary of the Treasury to refund such moneys is directly in violation of the said Act.

XI.

No action upon this claim other than herein set forth has been taken before Congress or any other of the departments of the Government.

XII.

Your petitioner avers that there is justly due and owing to it on account of matters hereinbefore set forth the sum of eight thousand three hundred dollars ($8,300), after deducting all just off-sets and demands on the part of the United States, and that it is the sole owner of the claim herein sued upon and that no assignment or transfer of the claim or any part thereof or any interest in the same has been made, and that it is a citizen of the United States and loyal to the same and it has not aided or abetted in any manner or given comfort to any sovereign or government that has been at war with the United States Government.

Wherefore, your petitioner prays judgment against the United States for the sum of eighty-three hundred dollars ($8,300).

FIDELITY AND DEPOSIT CO. OF MARYLAND,
By LYON AND LYON,
Attorneys for the Claimant.

11 DISTRICT OF COLUMBIA,
City of Washington, ss:

Personally appeared before me, a Notary Public in and for the District of Columbia, R. B. H. Lyon, who being duly sworn according to law, deposes and says that he is a member of the firm of Lyon and Lyon and that he is duly authorized to make oath in this cause by virtue of power of attorney herewith filed, and that he has read and understands the foregoing petition and that the facts herein set forth are true in substance and fact as he is informed and believes.

(Signed) R. B. H. LYON.

Subscribed and sworn to before me this 1st day of March, A. D. 1919.

(Signed) GEO. W. SMITH,
Notary Public.

My commission expires March 11, 1920.

12 CLAIMANT'S EXHIBIT "A."

Charter of the Fidelity and Deposit Company of Maryland.

This Company was formed under the provisions of Article 23 of the Code of Public General Laws of Maryland, title "Corporations," its certificate of incorporation having been signed by the Chief Judge of the Supreme Bench of Baltimore City.

The Legislature of Maryland, Session of 1890, made the Charter of the Company perpetual and enlarged its powers.

Section 8, referring to Cecil County, was repealed by the Legislature of 1894.

Certificate of Incorporation.

This Certificate of Incorporation, made this fifteenth day of February, in the year eighteen hundred and ninety, by Lloyd L. Jackson, Thomas C. Basshor, James Sloan, Jr., H. Crawford Black, Joseph R. Stonebraker, George W. Bishop, Edwin Warfield, George Cator, Clinton P. Paine, Robert Ober and George Warfield, all citizens of the State of Maryland.

Witnesseth, That the said Lloyd L. Jackson, Thomas C. Basshor, James Sloan, Jr., H. Crawford Black, Joseph R. Stonebraker, George W. Bishop, Edwin Warfield, George Cator, Clinton P. Paine, Robert Ober and George Warfield, do hereby form a corporation by the name and for the objects herein specified, to wit:

First. The name of the corporation shall be The Fidelity Loan and Trust Company of Baltimore City.

Second. The said corporation shall have power, and its objects and purposes shall be to receive money and other personal property in trust for safe keeping or storage, or otherwise, to accept and
13 execute trusts of every description as natural persons may, to buy, sell, convey, develop, improve and deal in real estate, to invest and to reinvest such trust funds as may be entrusted to them, and to change such investments at its pleasure, and to receive money on deposit at interest or otherwise as may be agreed on between it and the persons making such deposits.

Third. The duration of said corporation shall be forty years.

Fourth. The operation of said corporation shall be carried on within the State of Maryland and elsewhere, and the principal office shall be in the City of Baltimore.

Fifth. The capital stock of said corporation shall be five hundred thousand dollars, divided into ten thousand shares of stock of the par value of fifty dollars.

Sixth. The Directors of said Company shall be twelve in number, and the following named persons shall be directors who shall manage the concerns of the corporation for the first year: Lloyd L. Jackson, Thomas C. Basshor, James Sloan, Jr., H. Crawford Black, Joseph R. Stonebraker, George W. Bishop, Edwin Warfield, George Cator, Clinton P. Paine, Robert Ober, George Warfield and Wilbur F. Jackson.

In witness whereof, The said Lloyd L. Jackson, Thomas C. Basshor, James Sloan, Jr., H. Crawford Black, Joseph R. Stonebraker, George W. Bishop, Edwin Warfield, George Cator, Clinton P. Paine, Robert Ober and George Warfield have hereunto signed

their names and set forth their seals this 15th day of February, 1890.

LLOYD L. JACKSON. [SEAL.]
THOMAS C. BASSHOR. [SEAL.]
JAMES SLOAN, JR. [SEAL.]
H. CRAWFORD BLACK. [SEAL.]
JOS. R. STONEBRAKER. [SEAL.]
14 GEORGE W. BISHOP. [SEAL.]
EDWIN WARFIELD. [SEAL.]
GEORGE CATOR. [SEAL.]
CLINTON P. PAINE. [SEAL.]
ROBERT OBER. [SEAL.]
GEORGE WARFIELD. [SEAL.]

Test:
ROBERT A. THURSBY.

STATE OF MARYLAND,
City of Baltimore:

I hereby certify, That on this fifteenth day of February in the year eighteen hundred and ninety, before the subscriber, a Justice of the Peace of said State, in and for said City, personally appeared Lloyd L. Jackson, Thomas C. Basshor, James Sloan, Jr., H. Crawford Black, Jos. R. Stonebraker, George W. Bishop, Edwin Warfield, George Cator, Clinton P. Paine, Robert Ober and George Warfield, and acknowledged the aforegoing certificate of incorporation to be their act.

ROBERT A. THURSBY,
J. P.

I, Henry D. Harlan, Judge of the Supreme Bench of Baltimore City, do hereby certify that I have carefully examined the aforegoing certificate of incorporation, and I do hereby determine that the said certificate is in conformity with law and proper to be received.

HENRY D. HARLAN.

Recd. for Record Feb. 15th, 1890, at 3 O'clk. P. M. same day recorded & Exd. per Jas. Bond, Clerk.

I hereby certify that the foregoing is a true copy taken from Liber J. B. No. 27 folio 470 &c. one of the Charter Records of Baltimore City.

In testimony whereof I hereto set my hand and affix the
15 seal of the Superior Court of Baltimore City on this the 25th day of January, A. D. 1919.

STEPHEN C. LITTLE,
[SEAL.] *Clerk of the Superior Court of Baltimore City.*

MARYLAND, *set:*

I, Carroll T. Bond, Associate Judge of the Supreme Bench of Baltimore City, assigned to, and presiding in the Superior Court of Baltimore City, in the Eighth Judicial Circuit of said State, do

certify, that the foregoing attestation of Stephen C. Little, Clerk of the said Superior Court of Baltimore City, is in due form and by the proper officer.

Given under my hand, at the City of Baltimore, this twenty-fifth day of January, A. D. 1919.

CARROLL T. BOND.

STATE OF MARYLAND,
Baltimore City, set:

I, Stephen C. Little, Clerk of the Superior Court of Baltimore City, do hereby certify, That the Honorable Carroll T. Bond, who has certified and signed the above attestation, was, at the time of so doing, Presiding Judge of the Superior Court of Baltimore City, in the Eighth Judicial Circuit of the State of Maryland, duly Commissioned and Qualified and that to all acts done by him in that capacity, full faith and credit are due and ought to be given, and that his signature thereto is genuine.

In testimony whereof, I hereunto subscribe my name and affix the Seal of the Superior Court of Baltimore City, on this twenty-fifth day of January, A. D. 1919.

STEPHEN C. LITTLE,
[SEAL.] *Clerk of the Superior Court of Baltimore City.*

16 I hereby certify, That the aforegoing is a true copy taken from the original received for Record February 15, 1890, at 3 o'clock P. M.

In testimony whereof, I hereunto set my hand and affix the seal of the Superior Court of Baltimore City this 17th day of February, A. D. 1890.

JAMES BOND,
[SEAL.] *Clerk of the Superior Court of Baltimore City.*

Amendments to Charter.

Chapter 263 of the Laws of Maryland, 1890.

An Act to Change the Name of The Fidelity Loan and Trust Company of Baltimore City to the "Fidelity and Deposit Company of Maryland" and to Amend and Define the Powers of said Company.

Section 1. Be it enacted by the General Assembly of Maryland, That the name of The Fidelity Loan and Trust Company of Baltimore City, be and the same is hereby changed to that of the "Fidelity and Deposit Company of Maryland," and by such last mentioned name shall have perpetual succession and may adopt a corporate seal and may sue and be sued.

Section 2. And be it further enacted, That the number of directors of said Company shall be increased from twelve as stated in the certificate of incorporation of said Company to twenty-five, and that said twelve directors shall have power to elect the additional

thirteen required to fill up said board of twenty-five directors, and said twenty-five directors shall serve as the directors of said Company until the first Tuesday of May, eighteen hundred and ninety-one, (1891) or until their successors are duly elected and qualified;

Section 3. And be it further enacted, That said Company shall have power to receive money on deposit, to act as agent for the
17 purpose of issuing, registering, or countersigning certificates of stocks, bonds or other evidence of debt of any State, corporation, association, municipality or public authority on such terms as may be agreed upon, to deal in exchange, foreign and domestic, and in every and all description of properties, personal effects, securities, mortgages, land, certificates of indebtedness, stocks of incorporated Companies, notes, loans on bonds of the United States, or of any city, county, or municipality or of any incorporated Company, or any individual.

Section 4. And be it further enacted, That said Company shall be and is hereby authorized and empowered to insure the fidelity of persons holding places of trust or responsibility in, to or under any State, county, city, corporation, company, person or persons whatsoever; to become security for the faithful performance of any trust, office, duty contract or agreement, and to supersede any judgment, or to go upon any appeal or other bond; and it is further authorized to become sole surety in all cases where by law two or more sureties are required for the faithful performance of any trust or office and it shall and may be lawful for any court register, clerk or other officer to approve said Company as sole surety in all such cases, but in such cases the officers and affairs of said Company may be subject to an examination by such court, register clerk or other officers; and it shall be lawful for said Company to stipulate and provide for indemnity from the parties aforesaid for whom it shall so become responsible, and to enforce any bond, contract, agreement, pledge or other security made or given for that purpose.

Section 5. And be it further enacted, That any and every court into which moneys may be paid or deposited by agreement of parties order, judgment or decree of such court may order and direct the same to be deposited with said Company; and any individual
18 or administrator, guardian, committee, receiver, assignee, trustee, State, county or municipal government or corporation or public officer or any person or persons acting for others, having the custody of any bonds, stocks, securities, moneys or valuables shall be authorized to deposit the same for safe keeping with the said Company.

Section 6. And be it further enacted, That said Company shall have power to guarantee, endorse and secure the payment and punctual performance, and collection of notes, debts, bills of exchange, contracts, bonds, accounts, claims, rents, annuities, mortgages, choses in action, evidences of debt, certificates of property or value, checks and the titles to property, indebtedness of individuals, of Companies, partnerships, contracts, loans of States, cities, counties and municipalities on such terms or commissions as may

be agreed upon or established by said Company and the parties dealing therewith.

Section 7. And be it enacted, That said Company may receive upon storage deposit or otherwise, merchandise, specie, plate, bullion, stocks, promissory notes, certificates and evidences of debt, contracts, and all other personal property, and advance money thereupon on such terms as may be established or approved by said Company that in all cases in which public officers, or municipal or private corporations are authorized to deposit money, stocks, bonds or evidences of debt, such deposits by such officers or corporations may be made with said Company.

Section 8. And be it enacted, That said Company shall not be authorized by the provisions of this act to insure the fidelity of any person residing in Cecil County or to receive on deposit any money or other property from any person residing in Cecil County.

Section 9. And be it enacted, That this act shall take effect from the date of its passage.

Approved, April 3rd, 1890.

[The Great Seal of the State of Maryland.]

ELIHU E. JACKSON,
Governor.
JOHN HUBNER,
Speaker of the House of Delegates.
R. F. BRATTAN,
President of the Senate.

STATE OF MARYLAND, *set:*

I, Spencer C. Jones, Clerk of the Court of Appeals of Maryland, do hereby certify that the aforegoing is a full and true copy of the Act of the General Assembly of Maryland, of which it purports to be a copy, as taken from the Original Law, belonging to, and deposited in the office of the Clerk of the Court of Appeals aforesaid.

In testimony whereof, I have hereunto set my hand as Clerk, and affixed the seal of said Court of Appeals this 5th day of April, A. D. 1890.

[SEAL.] SPENCER C. JONES,
Clerk Court of Appeals of Maryland.

Chapter 330 *of the Laws of Maryland,* 1894.

An Act to Amend the Act of 1890, Chapter 263, by Repealing Section 8 of said Act, Which said Section Relates to Cecil County.

Section 1. Be it enacted by the General Assembly of Maryland, that Section 8, of the Acts of 1890, Chapter 263, be and the same is hereby repealed, provided, however, that nothing herein contained

shall operate to repeal or amend in any way any of the other Sections of said Act.

20 Section 2. And be it further enacted, That this Act shall take effect from the date of its passage.

Approved April 6th, 1894.

[The Great Seal of the State of Maryland.]

FRANK BROWN,
Governor.
JOHN WALTER SMITH,
President of the Senate.
JAMES H. PRESTON,
Speaker of the House of Delegates.

Office of the Secretary of the Senate.

I hereby certify that the aforegoing is a true copy of an Act of the General Assembly of Maryland, passed at the January Session, 1894.

J. ROGER McSHERRY,
Secretary of the Senate.

Chapter 358 *of the Laws of Maryland,* 1898.

An Act to Authorize the Stockholders of the Fidelity and Deposit Company of Maryland to Change the Name of Said Corporation.

Section 1. Be it enacted by the General Assembly of Maryland, That the stockholders of the Fidelity and Deposit Company of Maryland, a corporation chartered under the general laws of the State of Maryland, as the Fidelity Loan and Trust Company of Baltimore City, and the name of which was changed to the Fidelity and Deposit Company of Maryland, and its powers enlarged by an Act of the General Assembly of Maryland of 1890, Chapter 263, be, and they are, hereby authorized by a two-thirds vote of the stock of said corporation to change the name of said corporation at a special meeting called upon ten days' written notice to said stockholders, specifying the purpose of said meeting, and should the stockholders
21 so vote to change the name of said corporation at said meeting the President and Secretary shall make and record a certificate of the change of said name in the office of the clerk of the Superior Court of Baltimore City, and thereafter the said corporation shall be known by the name to which it may be so changed, and by said last mentioned name shall have perpetual succession, and may adopt a corporate seal, and may sue and be sued, provided, however, and it is hereby expressly declared that the change of the name thereby made shall in no wise affect the rights, privileges and powers of said corporation, and shall in no wise impair or affect existing contracts, engagements, debts and liabilities of said corporation with or to other persons, or of other persons with or to said corporation.

Section 2. And be it further enacted, That this Act shall take effect from the date of its passage.

Approved April 7, 1898.

[The Great Seal of the State of Maryland.]

LLOYD LOWNDES,
Governor.
LOUIS SCHAEFFER,
Speaker of the House of Delegates.
J. WIRT RANDALL,
President of the Senate.

Chapter 536 of the Laws of Maryland, 1900.

An Act to Amend, Confirm, and Enlarge the Powers of the Fidelity and Deposit Company of Maryland.

Section 1. Be it enacted by the General Assembly of Maryland, That the Fidelity and Deposit Company of Maryland, be and the same is hereby authorized and empowered, either solely or jointly with one or more sureties, to insure and become surety for the
22 fidelity of persons holding places of trust or responsibility, public or private, in, to or under the United States Government, or any colony, province or dependency thereof, and, in, to or under any foreign country or government, or any colony, province, department, city or county thereof; and to become surety, either solely or jointly with one or more other sureties, for the faithful performance of any trust, office, duty or contract, to be discharged or performed in any of the countries or within any of the jurisdictions aforesaid; and in all such cases, including those where by law, order, decree, rule or regulations, one or more sureties are required upon any bond, recognizance or stipulation, or for the faithful performance of any trust, office, duty or contract, the powers of said Company, shall embrace authority to execute, either solely or jointly with one or more other sureties, any bond, recognizance, stipulation or contract, having relation thereto.

Section 2. And be it further enacted, That the said Company be and it is hereby authorized and empowered to sign, make and execute bail bonds and recognizances and generally to act as surety for the faithful appearance and surrender of individuals as provided by any process of law or order of Court, of any State of the United States, or of the United States Government, or of any territory or dependency thereof, or of any foreign country, State or government, or of any branch or part of any foreign country, State or government.

Section 3. And be it further enacted, That the Directors of the Fidelity and Deposit Company of Maryland be and the same are hereby authorized and empowered, either at a general or special meeting, to name, constitute and appoint agents or attorneys, in any of the countries, and within any of the jurisdictions aforesaid, and to

invest such agents or attorneys with power and authority, on its behalf as surety, to make, sign, execute, deliver, justify upon,
23 and attach the Corporate Seal of said Company to, any bond, recognizance, stipulation or contract, within the scope of the chartered powers of said Company, and the said Directors are further authorized and empowered to provide that the execution by said agents or attorneys, of such bonds, recognizances, stipulations and contracts, shall be binding upon said Company.

Section 4. And be it further enacted, That the said Company shall have the powers herein granted, and also all the powers heretofore granted to it by its Articles of Incorporation under the General Incorporation Laws of the State of Maryland, and in addition, all powers conferred upon it by Chapter 263 of the Acts of the General Assembly of Maryland, passed at the Session of 1890, and Chapter 330 of the Acts of the General Assembly of Maryland, passed at the Session of 1894 and Chapter 354 of the Acts of the General Assembly of Maryland, passed at the Session of 1898, and shall have the right to exercise the same in any of the countries, or within any of the jurisdictions aforesaid.

Section 5. And be it further enacted, That this Act shall take effect from the date of its passage.

Approved April 7, 1900.

[The Great Seal of the State of Maryland.]

JOHN WALTER SMITH,
Governor.
LLOYD WILKINSON,
Speaker of the House of Delegates.
JOHN HUBNER,
President of the Senate.

STATE OF MARYLAND, *set:*

I, Allan Rutherford, Clerk of the Court of Appeals of Maryland, do hereby certify, that the foregoing is a full and true copy of the Act of the General Assembly of Maryland of which it pur-
24 ports to be a copy, as taken from the Original Law belonging to and deposited in the office of the Clerk of the Court of Appeals aforesaid.

In testimony whereof, I have hereunto set my hand as Clerk, and affixed the seal of the said Court of Appeals, this nineteenth day of April, A. D. 1900.

[SEAL.] ALLAN RUTHERFORD,
Clerk Court of Appeals of Maryland.

Chapter 643 *of the Laws of Maryland,* 1910.

An Act to Amend the Charter of the Fidelity and Deposit Company of Maryland by Amending Its Powers as Prescribed in Its Original Certificate of Incorporation, as Heretofore Amended by Chapter

263 of the Acts of 1890, Chapter 330 of the Acts of 1894, Chapter 358 of the Acts of 1898, and Chapter 536 of the Acts of 1900, by Repealing Paragraph Second in the Original Certificate of Incorporation and by Repealing Sections 3, 5 and 7 of Chapter 263 of the Acts of 1890, and by Repealing and Re-enacting with Amendments Section 4 of Chapter 263 of the Acts of 1890, and by Repealing and Re-enacting with Amendments Section 4 of Chapter 536 of the Acts of 1900, and by Adding Additional Sections Enlarging the Powers of Said Corporation.

Section 1. Be it enacted by the General Assembly of Maryland, That the charter of the Fidelity and Deposit Company of Maryland, as set forth in its original certificate of incorporation and in Chapter 263 of the Acts of 1890, chapter 330 of the Acts of 1894, Chapter 354 of the Acts of 1898, and Chapter 536 of the Act of 1900 be and the same is hereby amended as set forth in the following sections.

Section 2. And be it further enacted, That the paragraph numbered "Second" of the original certificate of incorporation of the Fidelity Loan and Trust Company of Baltimore City recorded in the Superior Court of Baltimore City on the 15th of February, 1890, the name of which said Corporation was by the Act of the General Assembly of Maryland of 1890, Chapter 263 changed to the Fidelity and Deposit Company of Maryland be and the same is hereby repealed and annulled.

Section 3. And be it further enacted, That Sections 3, 5 and 7 of Chapter 263 of the Acts of 1890 be and the same are hereby repealed.

Section 4. And be it further enacted, That Section 4 of Chapter 263 of the Acts of 1890 be and the same is hereby repealed and re-enacted, so as to read as follows:

Section 4. And be it further enacted, That said Company shall be and is hereby authorized and empowered to insure the fidelity of any person, partnership, association, corporation or company holding any place or position of trust or responsibility or owing any duty, contractual or otherwise, to any other person, partnership, association, corporation, company or to any city, county, State, territorial or foreign government, or to the United States Government, or any officer, board, commissioner, department or other Governmental agency of any such governments, to become surety or go upon any bond, undertaking or other obligation for the faithful performance of any trust, office, duty, contract, obligation or agreement; to become surety, or go upon any bond, undertaking or other obligation whatsoever nature, character or description, including all bonds, undertakings or other obligations permitted, required or authorized by any order, ordinance, rule, regulation or law in connection with any judicial proceeding, or with the performance of any duty imposed or act permitted by law, that said Company shall be and is hereby authorized and empowered to become sole surety in all cases where by law or order two or more sureties are re-

26 quired, and it shall be law for any Court, register, clerk or other officer or person, whose duty it is to approve any bond or other obligation permitted, required or authorized by law or order to be executed by two or more sureties, to approve such bond or obligation when executed by said Company as sole surety. That said Company shall be and is hereby authorized and empowered to receive and hold collateral and indemnity of any nature or kind whatsoever to secure it against loss on any bond or other obligation issued by it and to enforce any bond, contract, obligation, pledge or other security made or given for that purpose.

Section 5. And be it further enacted, That said corporation is also hereby authorized and empowered to insure any person or persons from death or injury on account of any accident or casualty whatsoever and also to insure any person or persons against sickness or disease of any sort or description or disability arising therefrom.

Section 6. And be it further enacted, That said corporation shall also have the power to insure any person, firm or corporation against liability for negligence and torts of any nature or description and against any and all loss, damage or liability arising from or occasioned by or through any negligence, wrongful act or accident whatsoever, or by theft, larceny, robbery or burglary, also against any damage to plate glass and against any loss of or damage to any personal property whatsoever, whether the same be in possession of the person or firm or corporation insured, or elsewhere and whether said loss or damage be due to accident, negligence or any other cause except that nothing herein contained shall authorize the said corporation to insure against loss by fire.

Section 7. And be it further enacted, That the said Company shall also have power to enter into an agreement with any administrator, guardian, receiver, trustee or other fiduciary for whom
27 it has become surety, for the deposit, subject to check or the safekeeping of any and all money, assets and other property for which he is or may be responsible, with any bank, savings bank, safe deposit or trust company selected by such fiduciary, in such manner as to prevent the withdrawal or alienation of such money, assets or other property or any part thereof from such banks, savings bank, safe deposit or trust company, without the countersignature or written consent of the said Company or its agents or an order of the Court or a Judge thereof having jurisdiction over such fiduciary, made on such notice to said Company as the Court or Judge may direct.

Section 8. And be it further enacted, That Section 4, Chapter 536 of the Acts of 1900, be and the same is hereby repealed and re-enacted so as to read as follows:

Section 4. And be it further enacted, That the said corporation shall have the authority and right to exercise any of the powers possessed by it in the State of Maryland and in any of the States,

Territories or possessions of the United States and in any foreign country or countries.

Approved, April 11, 1910.

[The Great Seal of the State of Maryland.]

AUSTIN L. CROTHERS,
Governor.
ADAM PEOPLES,
Speaker of the House of Delegates.
A. P. GORMAN, JR.,
President of the Senate.

STATE OF MARYLAND, *set:*

I, Caleb C. Magruder, Clerk of the Court of Appeals of Maryland, do hereby certify that the aforegoing is a full and true copy of the Act of the General Assembly of Maryland of which it purports to be a copy, as taken from the Original Law belonging to and deposited in the office of the Clerk of the Court of Appeals aforesaid:

In testimony whereof, I have hereunto set my hand as
28 Clerk and affixed the seal of the said Court of Appeals, this 27th day of April, 1910.

[Seal Court of Appeals.]

C. C. MAGRUDER,
Clerk Court of Appeals of Maryland.

STATE OF MARYLAND, *set:*

I, Caleb C. Magruder, Clerk of the Court of Appeals of Maryland, do hereby certify that the aforegoing are full and true copies of the Acts of the General Assembly of Maryland of which they purport to be copies, as taken from the original laws belonging to and deposited in the office of the Clerk of the Court of Appeals aforesaid.

In testimony whereof, I hereunto set my hand and the seal of the said Court of Appeals affix- this fourth day of February, nineteen hundred and nineteen.

[SEAL.] CALEB C. MAGRUDER,
Clerk of the Court of Appeals of Maryland.

The State of Maryland, Executive Department.

I, Emerson C. Harrington, Governor of the State of Maryland, and having control of the Great Seal thereof, Do Hereby Certify: That Caleb C. Magruder, who has signed the annexed Certificate, is now, and was at the date of the same, Clerk of the Court of Appeals of Maryland, and as such officer is duly authorized by the laws of Maryland to sign the same; and, further, that his signature and seal to the said Certificate I verily believe to be genuine.

In testimony whereof, I have hereunto set my hand and have caused to be hereto affixed the Great Seal of the State of Maryland,

at Annapolis, this fourth day of February, nineteen hundred and nineteen.

EMERSON C. HARRINGTON.

By the Governor:
[SEAL.]

THOS. W. SIMMONS,
Secretary of State.

29 II. *General Traverse.*

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, to the amended petition, a general traverse is entered as provided by Rule 34.

III. *Argument and Submission of Case.*

On May 4, 1920, this case was argued and submitted on merits by Messrs. Seth Shepard & R. B. H. Lyon, for claimant, and by Mr. Assistant Attorney General Frank Davis, Jr., and Mr. Charles H. Bradley, for defendant.

30 IV. *Findings of Fact and Conclusion of Law.*

Filed June 7, 1920.

This case having been heard by the Court of Claims, the Court, upon the evidence, makes the following

Findings of Fact.

I.

The plaintiff, the Fidelity and Deposit Company of Maryland, is a corporation duly organized and existing under and by virtue of the laws of the State of Maryland with its principal offices in Baltimore, Maryland. It was incorporated in February 1890, under article 23 of the Code of Public Laws of Maryland, its charter being amended at different times thereafter by special acts of the legislature of that State. True copies of the general laws, charter, and special acts referred to are incorporated in plaintiff's petition, a copy of which is attached to and made a part of these findings.

II.

During the period involved the plaintiff company had a place of business in the city of Baltimore, State of Maryland, in its own office building; where it carried on the following lines of business: (1) Surety business—that is, acting as surety upon bonds conditioned for the faithful performance of duties by principals; (2) banking business—that is, receiving money upon deposit subject to be paid or remitted on checks, drafts, or order, advancing or loaning money upon stocks and bonds—and also receiving commercial paper for

collection for its depositors; (3) safe-deposit business—that is, renting safe-deposit boxes for the safe-keeping of valuables; (4) acting as trustee upon bond issues by other corporations.

31 III.

The capital stock and surplus accounts of plaintiff company during the period in question were as follows:
For the year ending:

	Capital stock.	Surplus.
June 30, 1898.....	$1,000,000	$1,000,000
1899.....	1,500,000	1,850,000
1900.....	1,500,000	1,850,000
1901.....	2,000,000	2,550,000

A part of plaintiff's capital was invested in said office building. The cost value of this building and its book value, as carried by the plaintiff company during the period involved, was $600,000. This building constituted part of plaintiff's capital. Some portion of this building was used or employed by the plaintiff in its banking business, but what proportion so used as compared with the other portions of the building used in other branches of the company's business does not appear from the evidence.

The plaintiff's company's banking business was conducted as a part of its other business, and the expenses incident to the conduct of the banking business and the salaries and wages of its officers and employees, performing duties in that business, were paid in the same manner and out of the same fund or account that all similar expenses, salaries, and wages were paid by the plaintiff in the conduct of all its business. The expenses incident to the conduct of the banking business were paid out of the undivided profits accounts, but what was the amount of such expenses so paid, or in what proportion they were to the other expenses of the plaintiff company, does not appear from the evidence.

In connection with its banking business plaintiff also conducted its safe deposit business. Some part of plaintiff's said office building was used or employed in the conduct of this safe deposit business, but what part of proportion of the building was so used does not appear from the evidence.

IV.

The money derived from the sale of capital stock and the money of the surplus fund were permanently invested in real estate, bonds, stocks, and some few other securities, which was called by plaintiff and designated on its books as the "Capital Stock Department." The investments of the assets of this department, the capital stock money and surplus, were designated "Capital Stock Investments" and all operations of the department were recorded in distinct — from
32 the records of all other business transacted by the Company.

The investments of the Capital Stock Department were kept alone in a separate compartment in the company's vault, in envelopes earmarked "C-S."

V.

The plaintiff also maintained and operated the banking business of the company. The company received money on deposit from those whom it insured or bonded and these funds were deposited with the banking department. Credits were also opened by the deposit of moneys or currency subject to be remitted or paid upon draft, check or order, and the banking department advanced or loan-d money to its customers on notes secured or supported by stocks and bonds but not by bullion, bills of exchange or promissory notes. The money received on deposit as aforesaid, during the period in question was as follows:

For the year ending:

June 30, 1898	$2,632,625.66
1899	3,173,017.39
1900	3,739,275.47
1901	4,139,675.55

The following sums derived from the investment of these deposits were returned to the depositors as interest:

For the year ending:

Dec. 31, 1898	$49,291.88
1899	76,255.11
1900	84,191.18
1901	86,788.78

leaving a net income derived from this business as follows:
For the year ending:

Dec. 31, 1898	$43,607.64
1899	60,325.23
1900	78,275.29
1901	92,852.56

VI.

The business of the banking department was kept separate from other business conducted by plaintiff. The money received from deposits was invested in stocks and bonds which were kept in separate envelopes in separate compartments of the company's vaults and earmarmed "I. D." or "E. D.", respectively, according as they represented general individual deposits or deposits called "Estate Deposits" made by those bonded or insured by the company, and
33 the records of the business of the banking department were kept in separate books as accounts separate from the accounts of the Capital Stock Department.

VII.

Earnings from the two departments were carried to the undivided profits accounts of the company at the end of each year, after the

expenses of each department had been paid and charged to the appropriate department upon the separate accounts of that department out of the earnings of that department. A part of the income from each department was maintained as cash and remained uninvested, part of the money being carried by the respective departments as counter cash and the balance being deposited in the company's various depositaries. The money so deposited was not segregated according to the source from which it came, though the source of the items comprising its total amount was recorded in the respective books of each department.

VIII.

In each of the years in question plaintiff was required by and thereupon regularly and duly made to the Commissioner of Internal Revenue a return of its capital and surplus upon which defendants' duly authorized revenue officers assessed against and collected from plaintiff the total sum of $8,300 as special bankers' taxes under Section 2 of the Act of June 13, 1898, as follows:

For the fiscal year ending June 30, 1898, twenty-five thousand dollars ($25,000) at two dollars per thousand	$50.00
For the year ending June 30, 1899, one million one hundred twenty-five thousand dollars ($1,125,000)	2,250.00
For the year ending June 30, 1900, one million five hundred thousand dollars ($1,500,000)	3,000.00
For the year ending June 30, 1901, one million five hundred thousand dollars ($1,500,000)	3,000.00
Total tax on capital	$8,300.00

The sums so collected were duly and regularly reported by said officers and covered into the Treasury of the United States.

34 IX.

Under authority of the Act of July 27, 1912 (37 Stat., 240), plaintiff on November 22, 1913, filed its application in the Treasury Department praying the refund of said sum of $8,300 through the Collector of Internal Revenue, located in the city of Baltimore, Md., who, in the regular course of his official business, certified the same to the Treasury Department for its consideration. Its application was on the prescribed Internal Revenue form known as Form 46, revised November 1907, and was in all respects complete, regular and in accordance with the law and regulations and supported by the evidence and powers required. It alleged as ground for refund that the taxes in question were assessed and collected on plaintiff's capital and surplus, which were not used or employed in the banking business within the meaning of Section 2 of said War Revenue Act. Notwithstanding the said application for refund was rejected by the Secretary of the Treasury on April 16, 1917, and the Department has

never refunded and still refuses to refund to plaintiff the sums claimed as aforesaid.

Conclusions of Law.

Upon the foregoing findings of fact the Court decides as a conclusion of law, that the petition herein should be, and the same is hereby, dismissed, on authority of the case of Union Trust Company of Indianapolis v. United States, 55 C. Cls. 424.

Judgment is rendered against the plaintiff for the cost of printing the record in this cause, the amount thereof to be *be* entered by the Clerk and collected according to law.

35 V. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Seventh day of June, A. D., 1920, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendants, and do order, adjudge and decree that the plaintiff herein is not entitled to recover and shall not have and recover any sum in this action of and from the United States; and that the petition herein be and it hereby is dismissed on authority of the case of Union Trust Company of Indianapolis, Indiana, No. 33978, 55 C. Clms. 424; and it is further ordered, adjudged and decreed that the United States shall have and recover of and from the plaintiff herein the sum of Three Hundred and eighty-eight dollars and ninety-five cents ($388.95) the cost of printing the record in this case, to be collected by the Clerk, as provided by law.

By THE COURT.

VI. *Proceedings After Entry of Judgment.*

On August 6, 1920, claimant filed a motion for new trial and on September 24, 1920 filed a supplemental motion for new trial and for amendment of findings of fact. On January 10, 1921 these motions were overruled by the Court.

36 VII. *Claimant's Application for and Allowance of an Appeal.*

From the judgment rendered in the above cause on the 10th day of January, 1921 in favor of the defendant, the claimant, by its attorneys, on the 10th day of January, 1921 makes application for, and gives notice of, an appeal to the Supreme Court of the United States, the amount involved being the sum of $8,300.00.

LYON & LYON,
Attorneys for Claimant.

Filed January 10, 1921.

Ordered: That the above appeal be allowed as prayed for.

By THE COURT.

January 10, 1921.

37 Court of Claims.

No. 33976.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND

vs.

THE UNITED STATES.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact and conclusion of law entered by the court; of the judgment of the court; of the claimant's application for and allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Thirteenth day of January, A. D., 1921.

[Seal of the Court of Claims.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 28,055. Court of Claims. Term No. 698. Fidelity and Deposit Company of Maryland, appellant, vs. The United States. Filed January 24th, 1921. File No. 28,055.

INDEX.

STATUTES.

AUTHORITIES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 207.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

vs.

UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANT'S BRIEF.

STATEMENT OF CASE.

The appellant is a corporation organized February 15, 1890, under the Laws of Maryland. During the period involved in this controversy it carried on, in its own office building in Baltimore, the following businesses: (1) Surety business, that is, insuring the faithful performance of duties by principals; (2) banking business, that is, receiving moneys upon deposit, sub-

ject to check, draft, or order, loaning money on notes secured by stocks and bonds, and receiving commercial paper for collection for its depositors; (3) safe deposit business, that is, renting safe deposit boxes; (4) acting as trustee upon bond issues by other corporations.

During the years in question the capital and surplus of the corporation were as follows:

1898 capital.....	$1,000,000	surplus.....	$1,000,000
1899 capital.....	1,500,000	surplus.....	1,850,000
1900 capital.....	1,500,000	surplus.....	1,850,000
1901 capital.....	2,000,000	surplus.....	2,550,000

During each of these years the corporation was required to pay and did pay, to the authorized revenue officers, as special bankers taxes, under Section 2 of the Act of June 13, 1898, the following sums:

Year ending June 30, 1898, upon	$25,000 at $2 per thousand	$50.00
Year ending June 30, 1899, upon	1,125,000	2,250.00
Year ending June 30, 1900, upon	1,500,000	3,000.00
Year ending June 30, 1901, upon	1,500,000	3,000.00
	Making a total of	$8,300.00

These sums were covered into the Treasury of the United States. The Law under which the officials of the Government assumed to assess and collect these taxes reads as follows:

> "That from and after July 1, 1898, a special tax shall be, and hereby is, imposed annually as follows, that is to say:
>
> Bankers using or employing a capital not exceeding the sum of twenty-five thousand dollars ($25,000), shall pay fifty dollars ($50); when using

or employing a capital exceeding twenty-five thousand dollars ($25,000), for every additional thousand dollars in excess of twenty-five thousand dollars ($25,000), two dollars ($2), and in estimating capital, surplus shall be included. The amount of such annual tax shall in all cases be computed on the basis of the capital and surplus for the preceding fiscal year.

"Every person, firm and company and every incorporated or other bank, having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon drafts, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange or promissory notes are received for discount or sale, shall be a banker under this act: Provided, That any savings bank having no capital stock, and whose business is confined to receiving deposits and loaning or investing the same for the benefit of its depositors, and which does no other business of banking, shall not be subject to this tax."

The appellant duly filed its application in the Treasury Department praying for a refund of the said sum of $8,300.00 under the Act of July 27, 1912, which reads as follows:

"That all claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected under the provisions of Section twenty-nine of the Act of Congress approved June 13, 1898, known as the War Revenue Tax, or of any sums alleged to have been excessive or in any manner wrongfully collected under the provisions of said Act, may be presented to the Commissioner of Internal Revenue, on or before the first day of January, 1914, and not thereafter.

"Sec. 2. That the Secretary of the Treasury is hereby authorized and directed to pay, out of any

> moneys of the United States not otherwise appropriated to such claimants as have presented or shall hereafter present their claims and shall establish such erroneous or illegal assessments and collection, any sums paid by them or on their account or in their interest, to the United States under provisions of the Act aforesaid."

The application for refund was in all respects complete, regular and in accordance with the law and regulations and supported by the evidence and powers required. It asked for a refund upon the ground that the taxes in question had been assessed and collected on appellant's capital and surplus which were not used or employed in the banking business within the meaning of the Revenue Act first above quoted. The application was rejected and this suit was brought to recover the amount. The lower Court upon a hearing, and upon its findings of fact, rendered judgment against appellant and dismissed the action. It is the contention of appellant that upon the findings of fact made by the Court judgment should have been in favor of appellant.

The findings to be especially considered which, in the opinion of appellant, call for a reversal of the judgment, are the Fourth, Fifth, Sixth and Seventh (Record, pp. 20-22).

Upon reading these findings it will be seen:

1. The money derived from sale of appellant's capital stock and the money of the surplus funds were *permanently* invested in real estate, bonds, and other securities called by appellant and designated on its books as "capital stock department." The invested assets of this department—the capital stock money and surplus—were designated "capital stock investments,"

and *all* operations relating thereto were recorded in records distinct from the records of all other business transacted by the Company. The investments were kept alone in a separate compartment of the company's vault in envelopes ear-marked "C-S" (Finding IV, Rec. 20).

2. In like manner the business of the banking department was kept separate from the other business conducted by plaintiff. Money received from deposits was invested in stocks and bonds which were kept in separate envelopes in separate compartments of the company's vaults, and ear-marked "I-D" or "E-D," according as they represented general individual deposits, or estate deposits. The records of the business of the banking department were kept in separate books as accounts separate from those of the capital stock department (Finding VI, Rec. 21).

3. Earnings from the two departments were carried to the undivided profits account at the end of each year after the expenses of each department had been paid and charged to the appropriate department, upon the separate accounts of that department, out of the earnings of that department. Part of the income from each department was maintained as cash, and remained uninvested, part being carried by each department as counter cash, and the balance deposited in the company's various depositaries. The money so deposited was not segregated according to the source from which it came, though the source of the items comprising its total amount was recorded in the respective books of each department (Finding VII, Rec. 21).

It may be contended by the Government that the judgment of the court below finds justification in certain statements contained in Finding III, Record 20,

to the following effect: that part of plaintiff's capital was invested in its office building, which was used in part for its banking business, but what proportion thereof does not appear from the evidence; that the banking business was conducted as a part of its other business, and the expenses incident thereto, as well as salaries and wages, were paid out of the same fund or account as all similar expenses, salaries and wages were paid in the conduct of all its business; that such expenses incident to the conduct of the banking business were paid out of the undivided profits account, but the amount or proportion thereof as compared with other expenses does not appear from the evidence.

These statements in Finding III, Record 20, we submit do not modify or control the specific facts contained in Findings IV, VI and VII, Record 20-21. They are general in character, and if in conflict with the specific facts set forth in the later part of the findings, it is clear that the latter will govern.

> Hidden v. Jordan, 28 Cal. 301, 305-6.
> Warder v. Enslen, 73 Cal. 291.

Finding III, Record 20, contains the following: "Part of plaintiff's capital was invested in said office building. * * * Some portion of this building was used or employed by the plaintiff in its banking business, but what proportion * * * does not appear from the evidence."

This general statement is to be read in connection with the further findings of the Court:

(a) That the capital and surplus were permanently invested in real estate, etc. (which, of course, includes the office building) and these investments constituted

the "capital stock department" (Finding IV, Record 20).

(b) That all operations of *this department* were recorded in separate records, and the investments kept by themselves in a separate compartment and bore an especial identifying mark (Finding IV, Record 20).

(c) That the business of the *banking department* was kept separate from the other business of the plaintiff. The moneys deposited were invested in securities kept in separate envelopes, in separate compartments, and bore special identifying marks. The business of the banking department was kept in separate books of account wholly apart from the accounts of the capital stock department (Finding VI, Record 21).

(d) *That the expenses of each department were paid and charged to the appropriate department in its separate accounts, out of the earnings of that department.* (Finding VII, Record 21.)

These expenses, since no exception is made, of course, include any expenses incident to the use of a part of the office building, and it becomes immaterial that the proportion of the building which was so used, is not shown. As appears by these findings, both as a matter of bookkeeping and as a physical fact, there was a complete separation of the business of the banking department from the other businesses of the company. The operations of the capital stock department did not appear in the accounts of the banking business, and conversely the operations of the banking business did not appear in the records of the capital stock department. If any part of the capital or surplus had been used in the banking business the books of that department would properly have con-

tained entries showing such use, but as there were no such entries it would seem to follow that there was no such use.

It is stated further in Finding III, Record 20, "The plaintiff's company's banking business was conducted as a part of its other business, and the expenses incident to the conduct of the banking business * * * were paid in the same manner, and out of the same funds or account that all similar expenses * * * were paid in the conduct of its business."

Again, this general finding is to be read in connection with the specific findings already adverted to:

(a) That the capital and surplus were invested *permanently* and kept separate and apart, both as a physical fact and as a matter of accounting (Finding IV, Record 20).

(b) That the business of the banking department was carried on independently of the other department and the moneys belonging to it separately invested and kept separate and apart, both as a physical fact and as a matter of accounting (Finding VI, Record 21).

(c) That the expenses of the banking business were paid out of its earnings and charged upon its separate accounts, and only after these payments had been made and separate accounts had been made, was the balance of the earnings carried to the undivided profits account (Finding VII, Record 21).

Whatever is meant, therefore, by this general statement in Finding III, Record 20, it certainly cannot be construed to mean that any part of the capital or surplus, or any earnings resulting from the use of the capital or surplus, was used or employed in the banking business, since all of it was set apart, held and used in the capital stock department.

Furthermore, the Court of Claims found (Finding V, Record 21) that the banking department during each of the years in controversy had a net income running from over $43,000 in 1898 to over $92,000 in 1901. This net income was the amount derived from the utilization of the deposits after returning to the depositors the amount of interest allowed thereon. This would seem to demonstrate that no part of the capital or surplus of the appellant company was used or employed in the banking business since none was necessary.

In other words, the business of the two departments was in no manner commingled, but the funds of each were held and employed and the business relating thereto was conducted as though these two departments had been wholly separate and distinct corporations.

Again, it is recited in Finding III, Record 20: "The expenses incident to the conduct of the banking business were paid out of the undivided profits accounts but * * * the amount * * * or proportion * * * does not appear from the evidence."

By reference to Finding VII, Record 21, it will be seen, however, that the earnings from the two departments were not carried to the undivided profits account until the end of each year *after the expenses of each department had been paid out of the earnings of that department and charged to it upon its separate accounts.*

From all this it is apparent that the business of the banking department consisted of receiving, investing and loaning the money of its depositors, and paying the same out upon their checks and orders, and that no part of the capital stock or surplus was actually

used or employed. The only two operations the appellant conducted which would bring it within the statutory definition of "banker," were receiving money on deposit subject to check, and loaning money on collateral security. It is obvious that receiving money on deposit was not an operation which required the use of the capital or surplus. The loaning of money, however, did require funds out of which the loans might be made. That they were not made out of the founds of the capital stock department is clear since during all this period no part of the capital or surplus was in the form of money, but all was permanently invested in real estate and securities kept intact in the vault of the company. Moreover, the loaning of money by the banking department from the capital or surplus would have necessitated the bringing together of the accounts of the two departments, whereas, the Court has distinctly found they were kept separate. The Court also found that the income of the banking department was derived from the investment of the deposits (Finding V, Record 21). It seems clear that there is nothing in the general statements contained in Finding III, Record 20, which modify the specific facts found by the Court in Findings IV, V, VI and VII, Record 20-21. If, however, this Court should conclude that the findings are inconsistent and incapable of being harmonized there is respectable authority to the effect that those findings most favorable to the appellant should be accepted. Ellerman v. Hyman, 192 N. Y. 113, 117; 127 Am. St. Rep. 862, 864. In any event such inconsistencies would preclude an affirmance of the judgment of the Court below, 38 Cyc. 1986.

HISTORY OF STATUTES IMPOSING SPECIAL BANKERS TAX.

The Act of June 13, 1898, imposing the special excise tax on bankers for the purpose of raising revenue to conduct the Spanish War was not a new form of taxation. That statute was modeled after the act of June 30, 1864 (13 Stat. 251), which statute likewise was a war revenue measure. With the exception of a few sentences clearing away ambiguities, the Act of 1898 follows closely the Act of 1864. The Act of 1864 imposed a special tax on bankers in the following language:

> "One. Bankers using or employing a capital not exceeding the sum of fifty thousand dollars, shall pay one hundred dollars for each license; when using or employing a capital exceeding fifty thousand dollars, for every additional thousand dollars in excess of fifty thousand dollars, two dollars. Every person, firm, or company, and every incorporated or other bank, having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or where money is advanced or lent on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or sale, shall be regarded a banker in this act; provided, that any savings bank having no capital stock, and whose business is confined to receiving deposits and loaning the same for the benefit of its depositors and which does no other business of banking, shall not be liable to pay for a license as a banker." (13 Stat. 251.)

The Act of 1864 was amended in 1866 (14 Stat. 115), when the opening sentence was changed to read as follows:

> "Banks chartered or organized under a general law, with a capital not exceeding $50,000, and bankers using or employing a capital not exceeding the sum of $50,000, shall pay $100; when exceeding $50,000, for every additional thousand dollars in excess of $50,000, two dollars."

Hence, while the Act of 1864 (the model of the Act of 1898) made the amount of the tax dependent upon the capital *used or employed in the banking business*, whether the banker was corporate or individual, the Act of 1866, distinguished between corporate and individual bankers and imposed the tax, in the case of corporate banks, upon their share capital, however employed, but, in case of individual bankers, only upon the capital *actually* employed. The cause of this amendment is indicated by Judge Woodruff in the case of *Clark v. Bailey*, 12 Blatch, 156, which arose under another act levying a tax on bank "capital," also originally passed in 1864, but amended in 1866 in precisely this same particular. Judge Woodruff pointed out that the purpose of the amendments of 1866 was to make the tax against corporate banks assessable upon their share capital without regard to its actual employment, while the tax against individual bankers was to be assessed upon capital actually *employed* in the banking business.

The case was carried to the Supreme Court of the United States, where, under the name of *Bailey vs. Clark*, 21 Wall. 284, the judgment was affirmed.

The Court in this case defined the term "Capital" in the taxing statute as follows:

> "When used with respect to the property of a corporation or association the term (capital) has a settled meaning. It applies only to the property or means contributed by the stockholders as the

fund or basis for the business enterprise for which the corporation or association was formed'' (p. 284).

The acts of 1864 and 1866 were repealed, but in reenacting the bankers tax in 1898, the distinction between individual and corporate banks was abolished and the tax upon bankers of both classes was based upon the capital used or employed in the banking business. The Act of June 13, 1898, was repealed July 1, 1902. The tax on bankers was again restored by the Act of October 22, 1914 (38 Stat. 750), which reads as follows:

> ''Bankers shall pay $1.00 for each thousand dollars of capital used or employed and in estimating capital, surplus and undivided profits shall be included. The amount of such annual tax shall in all cases be computed on the basis of the capital, surplus and undivided profits for the preceding fiscal year. Every person, firm, or company, and every incorporated or other bank, having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange or promissory notes are received for discount or sale, shall be a banker under this Act; PROVIDED, That any postal savings bank, or savings bank having no capital stock, and whose business is confined to receiving deposits and loaning or investing the same for the benefit of its depositors and which does no other business of banking, shall not be subject to this tax * * *.''

This latter Act was repealed to take effect December 31, 1916.

DECISIONS OF THE FEDERAL COURTS RELATING TO THE SPECIAL BANKERS' TAXES.

Section II of the Act of June 13, 1898 (30 Stat. 448), was considered in the cases of the Farmers Loan and Trust Company and the Central Trust Company of New York vs. Treat, Collector, 171 Fed. Rep. 301. The decision of the United States District Court was affirmed by the Circuit Court of Appeals, February 14, 1911, in Treat vs. Farmers Loan and Trust Company, 185 Fed. Rep. 760-765. These appear to be the only cases in which the Special Bankers Tax imposed by that Act was considered and the judgments in these cases were acquiesced in by the United States and paid by appropriation of Congress in 1912.

When these judgments were paid, however, the claim of the appellant and of others similarly situated could not be considered because of Section 3228 of the Revised Statutes, which required a claim for refund be made within two years from the date of payment of the tax.

Congress, however, enacted the Act of July 27, 1912 (37 Stat. 240), *supra*, page 3, under which the claim of the appellant was duly filed.

The lower court in the Central Trust Company case (*supra*) said:

> "It will be observed that the 'capital and surplus' which is subjected to the tax, is that which is used or employed by the banker; *i. e.*, in the banking business. The evidence shows that the entire amount of these undivided profits before, during and at the end of the fiscal year, were invested in municipal and railway bonds and in the stocks of corporations and were not in any sense employed in the business of banking, although the ownership of this large amount of securities

> available to make good the losses in any of the enterprises which the corporation was conducting naturally increased its credit generally."

In affirming this case the Circuit Court of Appeals said in Treat vs. Farmers Loan and Trust Co. (185 Fed. 760):

> "The questions for consideration are whether the capital and surplus of either the plaintiff companies (also Central Trust Co.) were subject to the tax and whether the interests and costs of either were properly awarded against the defendant.
>
> The agreed statements show that the capital and surplus of both companies are permanently invested in stocks and bonds; that the only business the companies do as bankers within the definition of banking in the act, is the opening of credits by deposit or collections of money and paying the amount on checks, draft or order, and the loaning of money on stocks, bonds or secured paper. This business is done entirely by means of the depositor's money. As the act only taxes the capital used or employed in banking, we think the circuit Judge was entirely right in holding as a matter of law, that the plaintiffs, not using their capital or surplus in banking, were not subject to the payment of any tax thereon. No doubt they got credit by the amount of their capital and surplus, but Congress evidently intended to put corporations upon the same basis as individuals, and it would be obviously very unfair to tax an individual upon his whole fortune because he was using part of it in the banking business."

The intention of Congress as thus set forth is evidenced and emphasized by the fact that by the Act of 1864 (*supra*, p. 11), individual and corporate banks were upon the same footing. The Act of 1866 (*supra*,

p. 11), however, taxed corporate banks according to the amount of capital, irrespective of its use, while it taxed individual bankers on capital actually used or employed. It is significant that in re-enacting the bankers tax in 1898, Congress did not use the language of the 1866 Act, which discriminated against chartered or organized banks, but reverted to the language of the Act of 1864, wherein corporations and individuals were again placed upon the same footing.

The assessment of the tax for the year 1898 was upon the minimum amount, that is, upon an amount *not exceeding* $25,000. The taxing officers by thus imposing the tax upon a *nominal* capital and surplus evidently considered that the *actual* capital and surplus was not used or employed in the banking business. This practical construction of the law is a recognition of the correctness of our position.

After the passage of the Act of 1914 (*supra*, p. 13), litigation arose as to the construction of that Act and the reported cases are as follows:

I. Anderson, Collector, vs. Farmers Loan and Trust Company, 241 Fed. Rep. 322.

II. Real Estate Title Insurance and Trust Company vs. Lederer, Collector, 229 Fed. Rep. 299; 263 Fed. Rep. 667.

III. Germantown Trust Co. vs. Lederer, Collector, 263 Fed. Rep. 672.

IV. Fidelity Trust Company of Maryland vs. Miles, Collector, 258 Fed. Rep. 770.

V. Title Guarantee and Trust Company vs. Miles, Collector, 258 Fed. Rep. 771.

In the first of these cases, Anderson vs. Farmers Loan and Trust Company, 241 Fed. 322, the plaintiff was again the Farmers Loan and Trust Company, the same plaintiff who had recovered under the act of 1898. The lower court rendered judgment for the plaintiff. On appeal the Circuit Court of Appeals reversed the judgment of the lower court upon the ground that the burden of proof was upon the plaintiff to show that its capital surplus and undivided profits were not used or employed in the banking business. It was conceded therein that if it had been shown what part of its capital and surplus had not been used or employed in the banking business, the Trust Company would have been entitled to a refund of that part of the tax that was measured or determined by the capital and surplus not used or employed in banking.

In the case of Real Estate Title Insurance & Trust Company vs. Lederer, 229 Fed. 299; 263 Fed. 667, the banking business was a part of the business conducted by the company. It was also engaged in the four distinct businesses of title insurance, trust, safe deposit, and real estate. The entire capital, surplus and undivided profits were used as a basis in computing the tax to be paid by it as a banker. The business of each of the departments of the company was conducted separately, the facts being substantially identical with the facts in the instant case. The Circuit Court of Appeals, reversing the lower Court, held the Trust Company entitled to recover. The Court said:

> "The plaintiff Trust Company, by virtue of corporate powers thereto enabling it, is, besides banking, engaged in four other distinct businesses: first, insuring titles; second, executing trusts; third, safe deposit, and fourth, real es-

tate; and in carrying such title, trust, safe deposit and real estate businesses, the plaintiff does none of the several acts which the statute defines as constituting banking; that is to say, it does not receive deposits, make collections, loan money or discount or sell notes. From which it will appear that if the plaintiff company were only carrying on, first, its title insurance business; second, its trust business; third, its safe deposit, and fourth, its real estate business, it would not be subject to tax under this Act as being engaged in the banking business. Such being the undoubted fact, does the further fact that plaintiff adds a fifth business, viz., that of banking, to its corporate acts, thereby subject to the taxing scope of this Act not only $1 for each $1,000 of capital used or employed in its banking business, but also for each $1,000 used or employed (first) in its title business, (second) in its trust business, (third) in its safe deposit, and (fourth) in its real estate business. We think the statement of such proposition is of itself an answer to the contention. And for this reason, first, the act by its terms does not impose a tax on the capital or surplus used in title, trust, safe deposit or real estate business; second, the act not expressly imposing a tax on such title, etc., business, such tax can not be imposed by implication for the authorities are uniform that taxes being a statutory burden imposed by the government upon its citizens, they must have express statutory warrant; * * *"

The case of Germantown Trust Company v. Lederer, 263 Fed. 672, was decided, affirming the court below, upon the ground that the Germantown Trust Company had failed to meet the burden of proof upon it to show that its capital and surplus were not used or employed in its banking business. As in Anderson vs. Farmers Loan and Trust Company, *supra*, the plain-

tiff's right to recover was conceded if it had shown, as in the case of the Real Estate Title Insurance and Trust Company, its capital and surplus was not used or employed in banking.

The Maryland District Court sitting without a jury found in the case of Fidelity Trust Company vs. Miles, 258 Fed. 770, that the plaintiff had not shown that its capital was not used in the banking business. At the same time the same court held that the Title Guarantee & Trust Company, 258 Fed. 771, was entitled to recover for that portion of the tax computed upon its capital which it had shown was not used or employed in its banking business.

The Court of Claims in the Union Trust Co., case 55 Ct. Cl., page 424, referred to by the Court of Claims as authority for dismissal of the instant case, held that in computing the tax on bankers the entire capital of the banker, corporate or individual (for the taxing act makes no distinction between them), was to be considered in computing the tax, whether it was used or employed in the banking business. That would mean that a department store with, for example, a capital and surplus of $5,000,000, that merely as incident to its business and for convenience of its customers, collected drafts for its customers and held the money so collected subject to check, but which did not use or employ its capital in so doing and which did no other banking business as defined by the Act, would be subject to a tax of $10,000 under the interpretation placed upon the act by the Court of Claims. Such construction is contrary to the plain intent and purpose of the act, as shown by the various decisions hereinbefore cited *supra*.

If an individual or corporation uses part of his or

its capital in banking and part in a manufacturing business, it cannot be held that as far as the manufacturing business is concerned, the person or corporation is a banker upon whom the tax is levied. The error of the court below lay in putting all the emphasis upon the term "using capital" and none upon the word "bankers." The tax is an excise tax on "bankers." The term "bankers" is further limited by the phrase, "using or employing capital." The amount of the tax is determined or measured by the amount of the capital employed. Spreckles Sugar Refining Co. vs. McClain, 192 U. S. 397. If in the instant case the tax is to be measured not by the capital employed in banking but by the capital employed in the surety, safe deposit and trust business, the tax is not a tax on bankers, but upon the right to conduct a surety, safe deposit and trust business. Taxes upon the surety business were imposed by the same act, under the stamp tax provisions, Schedule "A," at p. 461, each bond being required to have stamps affixed of ½ of one cent for each dollar of the premiums charged.

In view of the identity of the two statutes, that is, the Act of June 13, 1898, and the Act of October 22, 1914, it may be assumed with entire certainty that Congress meant by the Act of October 22, 1914, precisely what it meant by the Act of June 13, 1898, and that considerations which control the judicial construction of the Act of June 13, 1898, control equally the judicial construction of the Act of October 22, 1914.

Therefore it is fair to assume that Congress in enacting the Act of October 22, 1914, adopted the unreversed, publicly reported judicial construction of these provisions contained in the Act of 1898 and intended in adopting them to have them read and considered in the light of the prior decisions.

Real Estate Title, Insurance and Trust Co. v. Lederer, 263 Fed. 667, 671-2.

It is therefore submitted that the history of the legislation, the language used, and the judicial interpretation of that language, leave no room for doubt as to the soundness of our position. But if the Court should still entertain any doubt it must "be resolved in favor of those upon whom the tax is sought to be laid." (Judge Gray in the Spreckels case, 113 Fed. 247.) This old and familiar rule of construction applicable to all forms of taxation, but particularly special taxes, has come down to us unchanged from the English courts which first announced it. (Eidman vs. Martinez, 184 U. S. 578; Treat vs. White, 181 U. S. 264, 267.)

It may be argued by the appellee that the potential capital resources of the company, though perhaps not actually used in the banking business, were the basis of the company's ability to do a banking business, and therefore for the purposes of taxation, should be considered as used in the business. It is not, however, the possible or even the probable use of the capital that determines whether the tax will lie, but its actual use and employment in the banking business.

In the case of the Alabama Great Southern R. R. vs. U. S., 49 Ct. Cl. 522, the question was whether under the land grand statutes the militia of the states held the status of troops of the "United States."

The Court said at page 537:

> "That the National Guard, composed of Volunteers, may become troops of the 'U. S.' within the meaning of the said land grant act is not to be questioned, but, as was said at the bar in this

case, it is not the potentiality but the actuality of being in the service contemplated by the Constitution which fixes their status as troops."

This was approved in U. S. vs. The Union Pacific Ry., 249 U. S. 359.

LIMITATION.

The refunding act was passed July 27, 1912 (27 Stat. 240), and the limit of time within which claims might have been filed with the Commissioner of Internal Revenue was set at January 1, 1914. The claim was filed on November 22, 1913, and action was brought in this court on July 25, 1918. The period of limitation does not begin to run until January 1, 1920.

U. S. vs. Hvoslef, 237 U. S. 1.
Sage vs. U. S., 250 U. S. 33.
Kahn *et al.*, vs. U. S. No. 52, October Term, 1921.

PROTEST.

Protest at the time of payment of the tax was not necessary in order to allow suit to be brought under a refunding act.

U. S. vs. Hvoslef, 237 U. S. 1.
U. S. vs. Fidelity Trust Co., 222 U. S., 158 Law Ed. 137.
U. S. vs. Jones, 236 U. S. 106.
Sage vs. U. S. 250 U. S. 33.

LACHES.

The appellant's petition in the Court of Claims was dismissed upon the authority of the Union Trust Company against the United States, 55 Court of Claims 424, and the Union Trust Company was charged with

laches in that decision. Final action by the Court of Claims in the Union Trust Company case is awaiting the disposition of this case by this Honorable Court. The facts in this case disclose that there was no laches on the part of the appellant. The cases of the Farmers Loan and Trust Company vs. Lederer, 185 Fed. 760, and the Central Trust Company vs. Lederer, 185 Fed. 765, were decided by the Circuit Court of Appeals on the 14th day of February, 1911. Under the revenue laws both the Union Trust Company of Indianapolis and the appellant company were barred under Section 3228 of the Revised Statutes from presenting a claim for refund. Congress enacted the refunding act of July 27, 1912 (37 Stat. 240), and allowed the taxpayer under that Act until January 1, 1914, to file claim for refund of taxes. The appellant's claim was filed on the 22d day of November, 1913. The Commissioner of Internal Revenue, however, did not pass upon this appellant's claim until April, 1917, when it was rejected, and suit in the Court of Claims was filed therein on July 25, 1918, or a year and one-half before appellant's claim would have been barred by the statute. The recital of the facts shows that there was no laches on the part of the appellant.

MOTION TO REMAND.

The appellant heretofore submitted to this Honorable Court a motion to remand the cause to the Court below with directions to make from the evidence already in the record certain additional findings, which would have removed any possible conflict in the findings as now made. This motion was overruled without prejudice. If the Court shall now be of opinion that any such conflict exists, or that the findings are insufficient in any of the particulars specified in the motion, we respectfully ask the Court to again consider whether the motion should be granted.

Upon the findings now in the Record before this Court we submit, however, that the judgment of the Court of Claims should be reversed with directions to enter judgment for the appellant.

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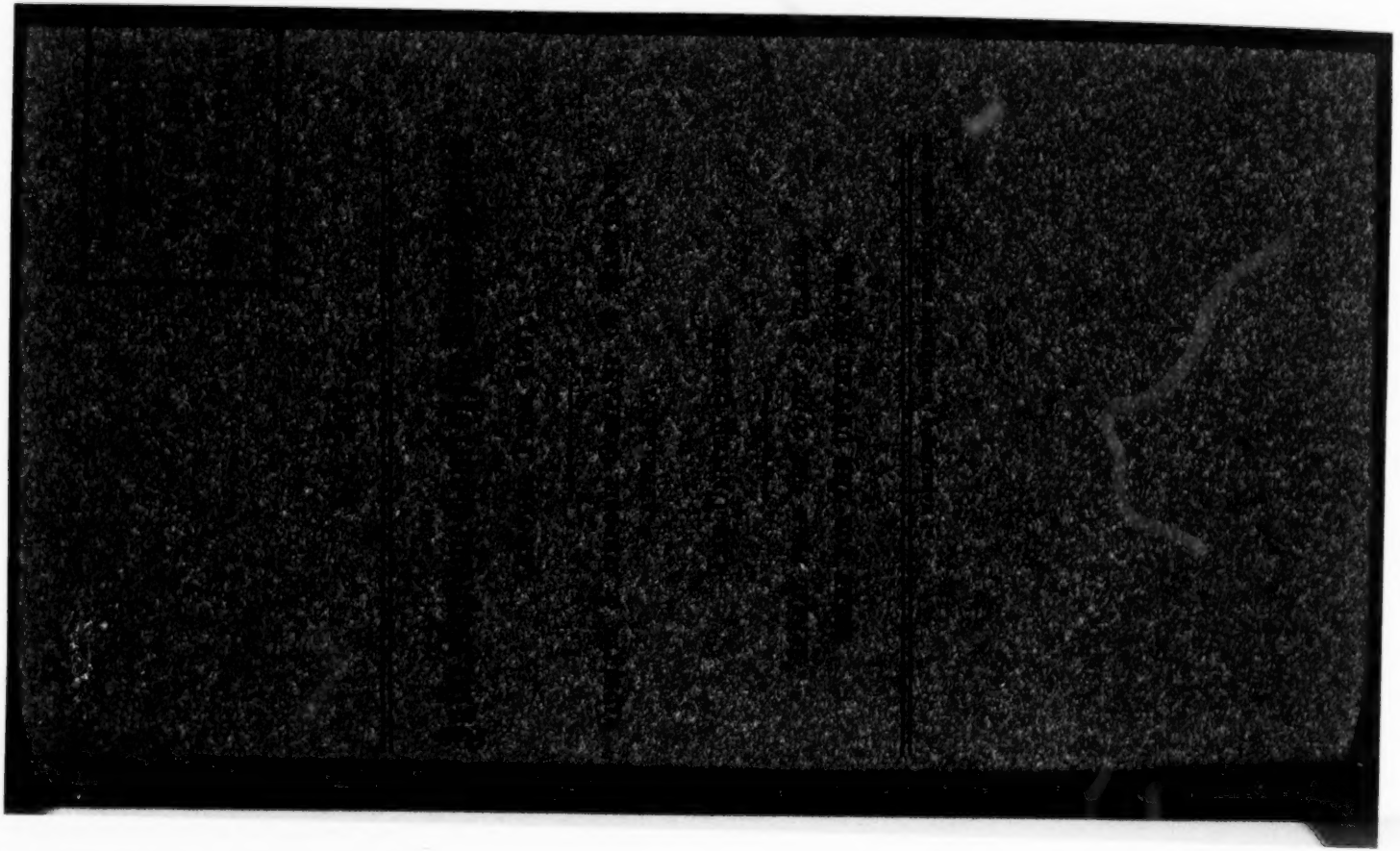

INDEX.

CASES CITED.

STATUTES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, appellant,

v.

THE UNITED STATES.

No. 207.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

I.

STATEMENT OF FACTS.

This is an appeal from a judgment of the Court of Claims in favor of the United States, arising from collection by it of a bankers' special tax for the four fiscal years ending June 30, 1902, under the provisions of the war revenue act approved June 13, 1898, ch. 448, 30 Stat. L. 448:

> That from and after July 1, 1898, a special tax shall be, and hereby is, imposed annually as follows, that is to say:
>
> Bankers *using or employing a capital* not exceeding the sum of twenty-five thousand

> dollars shall pay fifty dollars; *when using or employing a capital* exceeding twenty-five thousand dollars, for every additional thousand dollars in excess of twenty-five thousand dollars, two dollars, and *in estimating capital, surplus shall be included.*
>
> * * * * *
>
> Every * * * company * * * having a place of business where credits are opened by the deposit or collection of money * * * shall be a banker under this act * * * (Italics ours.)

Plaintiff conducted its business in its own office building in Baltimore, Md. Its business included (1) surety business, (2) banking business, (3) safe-deposit business, (4) acting as trustee upon bond issues by other corporations.

It had a capital stock and surplus ranging from $2,000,000 in 1898 to over $4,500,000 in 1901. A part of its capital was invested in its office building, which cost $600,000. A portion of this building was occupied by appellant in its banking business. That portion does not appear from the evidence. It conducted its banking business as a part of its other business. A part of this building was occupied by the safe-deposit business, but that portion does not appear from the evidence.

Its capital stock and surplus funds were permanently invested in real estate bonds and other securities. These investments were kept alone in a separate compartment in the company's vaults.

The bank's deposits run from over $2,500,000 in 1898 to over $4,500,000 in 1901. The profits from its banking business amounted to over $570,000 in the four years.

The business of the banking department was kept separate from appellant's other business. The money received from deposits was invested in stocks and bonds which were kept in separate compartments of the company's vaults.

The company's net earnings were carried to the undivided profits account at the end of each year. Part of the bank profits were carried as counter cash and the balance deposited in the company's various depositaries. The money so deposited was not segregated.

The company regularly made to the Commissioner of Internal Revenue a return of its capital and surplus which was assessed a total sum of $8,300 during the four years under the act of 1898, which sums were duly covered into the United States Treasury.

The company claims as a ground for refund that the taxes in question were assessed and collected on its capital and surplus which were not used or employed in the banking business.

The commissioner refused to refund said taxes.

The Government insists (1) that the surplus and capital were employed in the banking business as a basis thereof; (2) that the deposits were permanently invested in stocks, bonds, etc.; (3) that they were used as and became a part of the capital of the

company and thus employed in the banking business; (4) that the profits were not only used as counter cash but were placed in various depositaries where they were mingled with the company's other profits and subject to draft; that the evidence does not show that these profits were not thus used in the banking business; (5) that section 3227 of the Revised Statutes, which provides that all actions with reference to taxes must be brought within two years from the time the right of action accrues, is a bar to this action; (6) that section 5, chapter 140, 38 Stat. L. 996 —

> Nor shall said Court of Claims have jurisdiction of any claim which is now barred by the provisions of any law of the United States—

constitutes and is a complete defense to this action.

II.

THE ISSUES.

1.

For the purpose of the tax, was the appellant a banker within the meaning of section 2, c. 448, act of June 13, 1898?

2.

Did the plaintiff, during the taxing period, use or employ a capital as a banker?

3.

Is the action barred by limitations?

III.

THE ARGUMENT.

1.

For the purpose of the tax, was appellant a banker within the meaning of section 2, c. 448, act of June 13, 1898?

As this is admitted we will not discuss it.

2.

The plaintiff used and employed a capital during the taxing period as a banker.

The business of appellant was conducted in its own office building, valued by appellant at $600,000. The business which it conducted was of the following character: First, surety business—that is, acting as surety upon bonds conditioned for the faithful performance of duties by principals; second, banking business—that is, receiving money upon deposit subject to be paid or remitted on check, draft, or order, advancing and loaning money upon stocks and bonds and also receiving commercial paper for collection for its depositors; third, safe deposit business—that is, renting safe-deposit boxes for the safekeeping of valuables; fourth, acting as trustee upon bond issues by other corporations. The surety business was plaintiff's chief business, and the next to this in volume and production of income was its banking business. The moneys which it received on deposit during the years in question, and about

which there is no dispute, were found by the Court of Claims as follows:

For the year ending:

June 30, 1898	$2,632,625.66
1899	3,173,017.39
1900	3,739,275.47
1901	4,139,675.55

A part of the money received on deposit was invested, and securities representing that amount were put in separate packages marked "I. D." and "E. D.," meaning, respectively, "individual" and "estate" deposits, and were placed in a separate compartment of appellant's vault. The interest or income derived from the securities representing the said moneys received on deposit was utilized, first, to pay interest upon the deposits, and the balance was, like plaintiff's other income, carried into the profits and loss or undivided profits account, commingled with appellant's other cash and placed in its depositories.

Securities representing the investment of much of plaintiff's capital assets were kept in separate packages marked "C. S.," meaning capital stock, and were placed in the same vault with its other securities above mentioned, representing the deposits, but in a separate compartment. These capital assets were listed in an account which plaintiff's witness designated as "capital investment," "capital stock," or "capital stock department." In this account there was included plaintiff's capital, surplus, undivided

profits, premium reserves, net profits, etc. It will be seen from this, and it is not shown to the contrary, *that plaintiff's entire capital was held as a basis for the operation of all of its departments*, and there is no designation or segregation of what part of capital and surplus is held and employed in the operation of (1) trust surety, (2) banking, (3) safe deposit, (4) trustee department.

Plaintiff's banking business was conducted along with its other business in the same office building, which represented a part of its capital, and, so far as the proof shows, with the same officers and employees. The expenses incident to the conduct of the banking business were paid out of the undivided profits of the company in the same manner in which its other operating expenses were paid. The proportion or amount of the office building which was used or employed in the banking business is not disclosed by the evidence. The taxes which plaintiff paid for the years here involved were not upon its entire capital and surplus, nor upon its entire capital stock and surplus, but appears from the evidence introduced, and so found as a fact by the Court of Claims, to be collected only upon less than one-half of the total amount of its capital stock and surplus.

In each of the years in question appellant was required by and regularly and duly made to the Commissioner of Internal Revenue a return of its capital and surplus, upon which there was assessed against and collected from plaintiff the total sum of $8,300

as special bankers' taxes under section 2 of the act of June 13, 1898.

The amount of capital and surplus which plaintiff reported to the Commissioner of Internal Revenue in making its return for assessment does not appear from the evidence, nor does it appear why plaintiff was not taxed upon the entire amount of its capital and surplus. It is clear from the amount of the taxes that appellant was not taxed upon its entire capital and surplus, nor upon its entire amount of capital stock and surplus, but upon less than 50 per cent of the capital stock and surplus. Thus it would appear that appellant had conceded that less than one-half of its capital stock and surplus or some portion of its capital had been used and employed in the banking business, and that the tax thereon was properly due and payable. It made no protest in the payment of these taxes and no effort to have them refunded until a claim was presented by Messrs. Lyon & Lyon, attorneys, on November 22, 1913, which claim was rejected by the Commissioner of Internal Revenue on or about April 16, 1917, and this suit brought July 25, 1918.

The theory on which appellant seeks to recover the taxes, and the only evidence offered to sustain their theory, is that securities representing the investment of much of plaintiff's capital assets were kept in a separate package marked "C. S.," meaning capital stock, and were placed in the same vault with its other securities, above mentioned, repre-

senting the deposits, but in a separate compartment. These capital assets were listed in an account designated as "capital investment." It is insisted on behalf of the appellee that there is nothing in this to show that the capital, though much of it was invested, was not used and employed in banking. Appellant had a capital on which it conducted its business, including that of banking, and its capital was as much available for banking as any other of its departments, and just as available for use when needed or desired. The employing of capital does not necessarily mean an actual use of it, but rather the having it available for use when and as needed or desirable. *Union Trust Co. of Indianapolis* v. *United States*, 55 Ct. Cls. 424.

Certainly, so far as the public was concerned, with whom appellant was dealing as a banker, it held out the fact that it had a capital and surplus, and upon the strength of that capital and surplus it invited the public to do business with it as a banker and did business with the public as a banker. It was certainly employing its capital in banking. The appellant, relying entirely on the proposition that no part of its capital or surplus was used or employed as a banker, because and for the reason that much of its capital was invested in securities, has completely failed to make out a case for the recovery of the tax; for the fact that plaintiff kept several packages of securities in separate compartments of its vault and marked each package as here-

tofore indicated would not determine, and is not proof, that one bundle of securities represented capital any more than the other; nor would it prove that appellant's capital was not used or employed in the banking business. When appellant received deposits, the money so received became its property and it did not act as trustee for such funds deposited. The relation of debtor and creditor was established between the bank and the depositors. This rule is too well settled to require citation of authorities. Any and all of plaintiff's assets, whether cash or securities, in which capital is invested were liable to the claims of the depositors, and plaintiff could not put certain securities, secured with the profits from the bank deposits, aside in a vault and say "We will make them assets or capital for use in the banking business, and the depositors are limited to them in satisfaction of their claims"; nor could they say "We will put aside in another compartment of the same vault certain other securities constituting the greater part of our capital and surplus, and the depositors shall have no right to them—we have marked them in a certain way and we say they are not used or employed in the banking business." A careful analysis, however, of the evidence shows that this is practically all there is to the alleged segregation and nonuse or employment of capital. The defendant insists that the capital assets in the form and manner held were as applicable to and employed as much in the banking business as in any other business conducted by appellant.

A.

THE AUTHORITIES.

The court held in *Canal & Banking Co.* v. *New Orleans*, 99 U. S. 97, at pages 98 and 99:

> * * * Now, does it lie with the bank to put its finger on a particular item of assets—its money on hand, for example (which appears to have consisted of legal tender)—and say that this item and no other item constituted its capital at that time? Does this depend upon the mere option of the bank? Why was not its cash on hand just as applicable to its deposits and other obligations as to its capital? Not a particle of proof was offered and it is difficult to see how any proof could have been offered to show that the cash exclusively constituted capital.
>
> * * * Can it be pretended that the cash on hand was the simple and only representative of that capital? Suppose that this cash had come to the bank from its depositors—and it is not shown to the contrary—would it be admissible then to say that it constituted its capital? In this suit the burden of proof is on the bank to show that it has been unlawfully taxed. The taxes of the assessor must stand unless it can be affirmatively controverted.

In the case of *Anderson* v. *Farmers Loan & Trust Co.*, 241 Fed. 322–324, referring to an alleged segregation of capital, the court said:

> No segregation took place, and the attempted segregation was an artificial transaction that

> in our opinion had no reality. The statute upon any other theory becomes futile and meaningless, and enables any bank holding investments equivalent in value to its capital, surplus, and undivided profits exempt from any franchise tax under the war revenue act.

Certainly the capital and surplus of plaintiff was employed, if not used, in banking, and plaintiff has not only failed to support the burden of proof which is upon it, but the evidence discloses affirmatively, we believe, that the capital was used and employed as much in banking as in any of its other three departments. The Circuit Court of Appeals for the Second Circuit, in the case of *Anderson* v. *Farmers' Loan & Trust Co.*, *supra*, at page 324, said:

> The trust company held investments to an amount exceeding the capital, surplus, and undivided profits. While these investments changed from time to time, they were held for long periods, and assets of the amount indicated may fairly be said to have been regularly invested. In 1906 the trust company for the first time opened a so-called "capital investment account," to which bonds and mortgages were debited to an amount exceeding the capital, surplus, and undivided profits. These mortgages appear to have been carried from the securities account and entered in this capital account in pencil.
>
> We do not think that the possession of securities of a value exceeding the capital, surplus, and undivided profits is proof that no part of the capital, surplus, and undivided

> profits is used or employed in banking. Deposits are not the property of the depositors, but of the trust company.

And again at page 326:

> The capital, surplus, and undivided profits which counsel for the defendant in error insists were not employed in banking, but were permanent investments, we regard as employed in all the business of the bank of every kind. They were available for any use, equally with all other assets of the company, and were therefore employed both in the banking and other business. And this is because the words "capital, surplus, and undivided profits" relate to no particular kind of property, but are expressions describing the amount of the residue of the assets after the liabilities have been deducted.

And again at pages 327 and 328 the court said:

> It is therefore a question of fact, to be determined at the trial, just how far the so-called permanent investments were employed in banking. We do not feel disposed to determine this as a matter of law, without having before us the respective requirements of the plaintiff's banking and trust business for such a character of securities. The nature of the employment of the company's real estate is also a question of fact. What proportionate amount is actually used for the banking business and for the trust business? If a further proportionate amount is used merely for leasing purposes, is such an employment in a purely additional line of business, or is it only in

> the banking and trust business because a mere method of saving rental for those lines of business where the land was too valuable to justify a building to be occupied only for offices of the company itself?
>
> We therefore do not intend to intimate that the trial court is not free to determine from the evidence offered how far the capital, surplus, and undivided profits are employed in banking. But the fact of employment or nonemployment is not to be determined by methods of bookkeeping, but by real transactions.

Anderson v. *Farmers' Loan & Trust Co.*, 241 Fed. 322, 328:

> When a trust company is organized, obtains subscriptions for capital stock, and then opens its doors, begins business, and receives various deposits, its assets comprise all its property of every kind. Some of this property it will invest in mortgages, bonds, and stocks; other portions it will loan; still other portions, constituting its cash on hand, it will hold to be drawn against by its customers; other portions of its funds will be used to pay clerks who are engaged solely in the trust, and not in the banking, end of the business. We do not regard any specific assets as constituting capital of the company. The capital, and in the same way the surplus and undivided profits, are the residue left after paying the obligations of the bank to its depositors, and any other indebtedness it may have. These claims may be satisfied out of any property, and

> the balance remaining, which is the capital, surplus, and undivided profits, is to be imputed equally to all kinds of property which the trust company may possess. The proper way, therefore, to determine what part of the capital, surplus, and undivided profits is employed in banking, is to find out what part of the total assets is so employed; when that is done, the same proportion of the capital, surplus, and undivided profits must be thus employed. Any other construction of the act seems to us unreasonable, and to involve the almost inevitable result that trust companies, which are close competitors of the national banks (at times outstripping them in banking business), will be found to be entirely free from a tax which the national banks will have to pay. If investments in securities are held for a long time, and exceed in value the capital, and a designation of these investments as investments of capital can be regarded as indicating that the trust company employs none of its capital in banking, almost every trust company will escape the tax.

In the case of *Germantown Trust Company* v. *Lederer*, 263 Fed. 672, the court held that the evidence was not sufficient to sustain a finding that the plaintiff's capital, surplus, and undivided profits were not used or employed in banking, and went on to say at pages 675 and 676:

> What constitutes capital, and how and in what amount it is employed in different departments of a trust company, including

> that of banking, is a question of fact to be determined by the use to which its assets of different kinds are put, and established by evidence of real transactions. *Real Estate Title Insurance & Trust Co.* v. *Lederer, collector*, 263 Fed. 667—C. C. A.—not by evidence merely that its permanent investments equal or exceed its capital (*Anderson* v. *Farmers' Loan & Trust Co., supra*) or by inference arising from a claimed exclusive use of "depositors' money" in banking. *Anderson* v. *Farmers' Loan & Trust Co., supra*. Therefore *deposits and capital are equally company assets*, equally available for the company's use, including that of investments, and equally liable for its debts.

In the case above referred to the Court of Appeals said, at page 675:

> In the case of *Anderson* v. *Farmers' Loan & Trust Co.*, and also in the case recently decided by this court, it was made clear that of a trust company's assets some part may be liable to the tax and some part may not, and to distinguish the parts there must be some segregation, separation, or distinction between that of the bank's assets which is capital, surplus, and undivided profits, and that which is not, in order to show a distinction in their use and in their liability to be taxed. That distinction, to be valid, can not be fanciful, mental, or merely one of bookkeeping, or based upon artificial transactions; it must be actual and be determined by real transactions. (Citing *Canal & Banking Co.* v. *New Orleans*, 99 U. S. 97.)

Appellant, on page 7 of its brief, while trying to get away from the finding of fact that the bank occupied an undefined portion of its office building, says: "These expenses * * * include any expenses incident to the use of a part of the office building." But the fact remains, as found by the lower court, that there was no showing as to how much of the office building the bank occupied, and no evidence that the *bank incurred any expense* by such occupancy.

On page 8 it quotes Finding III of the lower court, to wit, "the plaintiff company's banking business was conducted as a part of its other business," and endeavors to overcome it by repeating that its capital and surplus were invested and the securities placed in its vaults, and listed in its capital stock department. This does not even tend to prove that the finding of the lower court was wrong. This appellant was authorized to carry on four branches of business. Keeping a capital stock department *is not one of those branches.*

This is simply keeping track of a part of its assets which stand behind, and furnish the *basis* upon which it conducts all its branches. Its securities are for the protection of every person who deals with it through *any one of its branches.*

If dishonest bank officials had stolen all of its deposits, its securities could not have been locked up so safely but that it would have been compelled to bring them forth to liquidate its debts due its depositors. Having them listed in its capital stock

account would have proven a valueless subterfuge. And this is how its capital and surplus are used and employed in its banking business. It is not necessary for it to keep its securities upon a counter in its bank for them to be employed in its banking business. Its capital does not need to be placed in the cages of the bank office or passed out over the cashier's counter to be *employed* in the banking business. It is enough that "they were available for any use, equally with all other assets of the company, and were therefore employed both in the banking and other business." *Anderson* v. *Farmers Loan & Trust Co.*, 241 Fed. 324.

The case of *Bailey* v. *Clark*, 21 Wallace, 284, is relied upon by appellant as sustaining its contention. It seems quite clear, however, that it sustains the Government. On page 288, it says:

> It is undoubtedly true, as stated by the Attorney General, that capital used in the business of banking is none the less so because it is borrowed. The mere fact that the money *permanently invested* in the business is borrowed does not alter its character as capital. The question here is whether money not thus *permanently invested*, but *borrowed temporarily* in the ordinary course of business to meet an emergency, is capital; and we are clear that the term does not, either in common acceptation or within the meaning of the statute, embrace loans of that character.
>
> After controversies had arisen as to the interpretation to be given to the statute, upon the question at issue in this case, between bankers and the Government, Congress passed

> the act of 1872, defining the meaning of the terms "capital employed," in the one hundred and tenth section, and enacted that they "shall not include money borrowed or received from day to day in the usual course of business from any person not a partner of, or interested in, the said bank, association, or firm."

The court expressly says, "that capital used in the business of banking is none the less so because it is borrowed. The mere fact that the *money permanently invested* in the business is borrowed does not alter its character as capital." Appellant invested the deposits as "*permanently*" as it did its capital-stock fund. "The money received from deposits was invested in stocks and bonds which were kept in separate envelopes in separate compartments of the company's vaults and earmarked," etc. In other words, they were kept in exactly the same manner, and the investments were of the same kind, as the investments of the capital-stock department. *And appellant* insists that the capital-stock investments were "*permanent*" and the lower court found they were "*permanent*" investments, whatever that may mean. These deposits were not "borrowed temporarily in the ordinary course of business to meet an emergency."

This appellant, with its millions of resources, does not have any such emergencies.

This act was amended in 1872 defining the meaning of "capital employed" and enacted that those words "shall not include" deposits made from day to day.

With knowledge of these former statutes, Congress enacted the 1898 statute and *omitted all such language;* hence, Congress thus deliberately included all deposites not included in the proviso.

The interest collected on deposits *permanently invested* in 1898 amounted to $92,899.52.

If this meant 6 per cent on loans, it was interest on an invested capital of $1,548,325.

In 1899 the interest was $136,580.34. At 6 per cent on *permanent investments*, as testified, the invested capital was $2,276,339.

In 1900 the interest was $162,466.47. At 6 per cent on *permanent investments* the capital was $2,707,773.

In 1901 the interest was $179,641.34. At 6 per cent on *permanent investments* the capital was $2,994,022.

These figures only refer to *permanent investments* from deposits.

The total amount of deposits run from $2\frac{1}{2}$ to $4\frac{1}{4}$ millions.

We believe that these figures prove conclusively that, in any event, the *permanently invested capital* from the deposits amounted to a large amount above the assessment.

In *Richmond* v. *Blake*, 132 U. S. 597, this court said:

> He brings himself within the rule that Congress prescribed for determining who, *for the purposes of the taxation in question*—though not necessarily in the commercial sense—were bankers and what was banking business. That rule is expressed in words that leave no

> doubt as to what was the intention of Congress. The judgment below gives effect to that intention, and it is *affirmed*.

Just so, in the case at bar, appellant used its deposits as capital in its banking business in a larger amount than that upon which it was assessed. And to carry out the spirit of this war-time measure, this tax was just and right and should be sustained.

If capital is invested in business, it is certainly employed in the business.

To the same effect is the case of *Webb* v. *Armistead et al.*, 26 Fed. 70. On page 71 the court says:

> It thus appears that Armistead had no capital at any time. It is certain that he put none into his business; if we mean by capital that fund which is put up and subjected to the risks of business as a *basis of credit, and as a security to mercantile creditors* against loss from the misfortunes of trade.

In the case of *State Savings Bank* v. *City Council*, 98 Iowa, 737, the court says, at page 739:

> In order to ascertain the legislative intent, it is necessary to determine what is meant by the words "paid up capital," as used in the part of the act we have quoted. The word "capital," as applied to the money of a corporation, may refer to the money paid in by the stockholders for the use of the corporation, and commonly known as the capital stock; but, in a wider and more popular sense, it includes all the money and other property of the corporation *used in transacting its business*.

In the case of *State ex rel. Bank* v. *Board of Assessors et al.*, 48 La. Ann. Repts. 35, the court uses the following language, at page 37:

> In its broadest meaning capital signifies actual estate, whether in money or property, owned by an individual or corporation. 23 N. Y. 192.
>
> It is the fund upon which a corporation transacts business *which is liable to its creditors*, and in case of insolvency, passes to a receiver. 28 Barbour, 320.

In the case of *International Life Assurance Society of London* v. *The Commissioner of Taxes*, 28 Barbour (N. Y.) 318, appears the following:

> The plaintiffs in the above-entitled suits are foreign corporations, or associations organized under acts of Parliament of Great Britain, for the purposes of insurance * * *. The plaintiffs in each of these actions have complied with the provisions of this act by depositing with the comptroller each the sum of $100,000, in the securities required by the act, and have each established an agency for the transaction of business in the city of New York. Of the sum so deposited by the plaintiffs in the second above-entitled action, $50,000 was invested in stocks of the United States.
>
> This act declares that all persons or associations doing business in this State, and not residents thereof, shall be assessed and taxed on all sums *invested in any manner in said business* the same as if they were residents of this State. (*Laws of* 1855, *chap. 37.*)

It is insisted on the part of the plaintiffs that this act has no application to them.

They have each $100,000 *invested in the business* carried on by them in this State, and which is declared to be a fund for the security of their creditors within the United States. The provision of our statute in reference to corporations is that they are liable to taxation upon their capital. (1 *R. S.* 414, p. 1.) And the capital subject to taxation as such is defined by the Court of Appeals to be that fund upon which the corporation transacts its business, *which would be liable to its creditors*, and, in case of insolvency, pass to a receiver. (*Mutual Ins. Co.* v. *Supervisors of Erie County*, 4 *Comst.* 448.) We have seen that these deposits made by these plaintiffs are to be held as a fund to meet their liabilities to their creditors.

This case holds squarely that the capital deposited in a vault is *invested in the business.*

Webster says that *invest* means "to lay out money or capital in business with the view of obtaining an income or profit."

Under section 207 of the act of October 3, 1917, C. 63, 40 Stat. L. 306 (Comp. Stat., sec. 6336 3/8*h*) the term "invested capital" is defined as follows:

> (*h*) In the case of a foreign corporation or partnership or of a nonresident alien individual the term "invested capital" means *that proportion* of the entire invested capital, as defined and limited in this title, which the *net income* from sources within the United States *bears to the entire net income.*

This revenue act lays down the practical basic principle which should be applied to all corporations which carry on several branches of business.

If the capital is prorated among the different branches of its business in accordance with the profits of that branch as compared with all the branches, taking the net assets as the basis of the capital, the claimants would be dealt with justly, and the spirit of the law would be carried out.

Of course this can not be done in this case, because the appellants have not furnished the evidence for making this computation.

The case of *Pearce, Wheeless & Co.* v. *The City Council of Augusta*, 37 Ga., 597, is a tax case, and the court on page 599 quotes Bouvier with approval, as follows:

> "Capital in commerce, as applied to individuals, is those objects, whether consisting of money, or other property, which a merchant, trader, or other person, *adventures in an undertaking*." 1st Bouvier's, 233.

The capital of this appellant was adventured in the banking business because it was liable for all liabilities of the bank. This being true, it was certainly employed in that business.

> *Terre Haute, etc., R. Co.* v. *State, ex rel.*, 159 Ind. 438.

In the above case the court was called upon to construe the words "the full sum invested" and "capital employed," as used in the company's charter. The court said, on page 458:

> In popular sense, "the full sum invested" and "capital employed," which are clearly used here as synonymous terms, usually means an *original sum placed upon a venture* with a view to profits or an income.

The capital of appellant was certainly "placed upon a venture," to-wit, banking; for it was a guarantee against all losses.

On page 11 of the appellant's brief it sets forth part of the statute of 1864 and on page 12 a part of the amendment of that statute passed in 1866. Appellant then proceeds to state that "while the act of 1864 made the amount of the tax dependent upon the capital used or employed in the banking business, whether the banker was corporate or individual, the act of 1866 distinguished between corporate and individual bankers and imposed the tax in the case of corporate banks upon their usual capital, *however employed;* but, in case of individual bankers, only upon the capital actually employed."

I can not agree with this deduction; the amendment of 1866 refers to "banks chartered," etc., * * * and "bankers using or employing a capital," etc.

"Banks chartered" could only do a *banking business*—that is, the business for which it was chartered—and consequently those chartered banks must use their entire capital. It was not necessary to talk about "chartered banks," "using or employing" their capital in the banking business, for that is the only purpose for which they could use or employ their capital. *Central Trust Co. of N. Y. v. Treat,*

171 Fed. 302, which cites with approval, *Leather M'f'r's. National Bank* v. *Treat*, 116 Fed. 774. Of course, private bankers would only be taxed upon the money they would have in the business. They might own farms or stores besides the banking business; but a bank chartered for no other purpose than for the running of a bank must use its funds for that purpose only. Appellant then comments upon the opinion of Judge Woodruff in this same *Clark* v. *Bailey* case, which appears in 12 Blatchford, 156. Here again I must differ from appellant. Judge Woodruff said (pp. 158–159):

> Under the act of June 30, 1864, there was some uncertainty in the application of the terms used, when applied to a mere individual or firm. By the 110th section of that act (13 U. S. Stat. at Large, 277) the tax was directed to be levied, each month, "upon the average amount of the capital of any bank, association, company, or corporation, or person, engaged in the business of banking, beyond the amount invested in United States bonds." *When a person was found* engaged in the business of banking, *it was not clear that, as he answered the description* in the statute, the tax was not to be levied *on all of his capital, however invested or employed.* The same individual or firm might be engaged in the business of banking, and, at the same time, have capital employed in manufacturing or otherwise. * * * The act of 1866 removed this doubt. * * * Under the act of 1864, what was the "capital"

of such a person? It was not easy to say, unless, by construction, it was held to mean what the act of 1866 makes it mean, the capital employed in the business of banking. * * * So, also, in a supposable case, the capital of a firm may consist, in part, or even in whole, of money or property borrowed to be employed as capital, as the basis of the financial reputation and credit of a firm, and, as between the lender and the creditors of the firm, to be at the risk of the business. No doubt a member of a copartnership often borrows a portion, and sometimes the whole, of his contribution to the capital stock from personal friends. It may be lent for the very purpose of such contribution, and so become in every sense a part of the capital or stock in trade. No doubt all of the members of a copartnership, and even the firm in its joint capacity, may procure such special advances to be placed as between the lenders and the copartnership creditors, at the risk of the business, as the *basis of copartnership credit and to constitute the fund to which creditors may look as their security* before the lender is permitted to withdraw it. This suggestion is also made in order to exclude the contrary inference and not because any such state of facts exists in these cases.

In this case the question was whether or not money loaned or borrowed for *temporary use* should be considered as a part of the capital and the court held that such a loan should not be so considered.

Appellant quotes the court in this case as defining capital as follows:

> When used with respect to the property of a corporation or association the term (capital) has a settled meaning. It applies only to the property or means contributed by the stockholders as the *fund or basis* for the business enterprise for which the corporation or association was formed (p. 284).

This corporation was formed for four purposes, one of which is the banking business. The "means contributed by the stockholders as the *fund* or *basis* for the business enterprise for which the corporation was formed" was its capital stock, and that definition places appellant squarely within the class described.

When the acts of 1864 and 1866 were passed, Congress (in my opinion) never thought of a great trust company with powers to do banking and several other kinds of business.

Appellant was incorporated in 1890 under a statute passed in 1874. There is no evidence in this case of the existence of any earlier statute. It is a matter of common knowledge that trust companies like the appellant are comparatively modern institutions, with rather a small beginning some 40 years ago; consequently, when the statutes of 1864 and 1866 referred to banks, they meant banks pure and simple, and not great trust companies which run a bank as part of its business.

In *Anderson* v. *Farmer's Loan & Trust Co.*, 241 Fed. 326, Circuit Court of Appeals, second circuit, Judge Hand says:

> By the amendment of 1914 trust companies were allowed in addition to their former banking powers, to discount commercial paper and to accept drafts drawn upon them. The real distinction, however, which may be made between the case of *Treat* v. *Farmer's Loan & Trust Company*, 185 Fed. 760, 108 C. C. A. 98, and the case at bar is that in the Treat case *the trial judge found as a fact that the capital and surplus were not employed in banking*, but were permanently invested. In *Leather Manufacturers' Bank* v. *Treat*, *supra*, this court had reached an opposite conclusion in a case where the sole business was banking.
>
> The Farmers' Loan & Trust Company does a large trust business, the extent of which is not shown by the record. It also does a large banking business, the extent of which is at least partially shown. It would be possible to determine by further evidence the relative proportionate amounts of assets employed in banking and in trust business. If such a proportion were determined, and it appeared that one-half of the assets were employed in banking and the remaining one-half in trust business, it would seem to follow that one-half of the capital and surplus was employed in banking. The computation might be difficult, but it seems to us entirely practicable.
>
> Upon the most familiar principles one can not by suit recover any taxes once paid, which

> in fact were due even though the exact manner of their collection was not authorized.

The court will notice that this case distinguishes the *Treat* v. *Farmers' Loan & Trust Co.* case, 185 Fed. 760, by saying that "The real distinction is that in the Treat case the trial judge found as a fact that the capital and surplus were not employed in banking."

In the instant case the lower court found that they were employed in banking.

In other words, it is the duty of the appellant to prove that it was not employing a capital equal to the amount assessed.

Its capital stock, its surplus, and its deposits run from over four and one-half millions in 1898, when it was assessed on $25,000, to nearly nine millions in 1901, when it was assessed on $1,500,000.

To this must be added its undivided profits. In these four years there was carried to the undivided profits account over $275,000. How many more millions were in this account does not appear. *After all profits had been transferred to this one account—*

> a part of the income from each department was maintained as cash and remained uninvested, part of the money being carried by the respective departments as counter cash and the balance being deposited in the company's various depositories. The money so deposited was not segregated according to the source from which it came, though the source of the items comprising its total amount was recorded in the respective books of each department. (See Finding VII, R. 22.)

What was done with these vast sums in these depositories does not appear. Ordinarily they are subject to drafts issued by the bank.

In my opinion, from anything that appears in this record, one and one-half millions of dollars in this account may have been used by the bank.

And it makes no difference as to the manner in which the tax was assessed. If the tax was due the United States in any manner, or from any fund, the appellant can not recover.

Appellant, by its argument on page 16 of its brief, seems to think that if it can show that its money received from the sale of its stock, together with its surplus, were not physically used in its bank, it can escape the tax. The Government believes that as the statute says "capital used or employed including surplus" the law includes any fund so used, without regard to where the bank gets it; and that whatever fund is so used, that fund is the capital employed.

And in this instance it may have been deposits, or undivided profits, or undivided profits which were actually used, or an equitable portion of its entire net assets, found by comparing its banking business with the business of its other branches.

As the appellant has not furnished the court with the facts by which it can arrive at this conclusion and proper adjustment, it has failed to make out its case, and it must pay this tax.

In *Real Estate Title Insurance & Trust Co.* v. *Lederer*, 229 Fed. 803, banking was a part of its business.

The court says:

> It lays claim to the benefit of the principle of exemption from taxation which it asserts to have been applied in the cases of *Central Trust Co.* v. *Treat* (C. C.), 171 Fed. 301, and *Treat* v. *Farmers*, 185 Fed. 760, 108 C. C. A. 98.
>
> If the principle there applied is as broad as it is claimed to be, and can be upheld as law and is applicable, it undoubtedly rules the present case in favor of the plaintiff. It is confidently asserted that the rule established by these cases is that, if the moneys received from depositors are kept separate from the other moneys of the bank and are invested in securities which are likewise kept separate from the other investments of the bank, and no more in amount of the moneys of the bank are invested in commercial paper by discount or purchase than is represented by the investments made of deposit moneys, the other moneys of the bank being invested in so-called permanent (whatever this may mean) forms of investment, then the legal inference is that no part of the capital of the bank is invested in banking except the sums which may have been spent for a banking house or banking fixtures and the like.
>
> We do not understand any such principle to be deducible from the rulings in the cited case. There are, it is true, some expressions in the opinions accompanying the rulings which supply plausible support to the argument of counsel for plaintiff. As has been often remarked, however, opinions are to be read in the light of the facts of the case to which they

relate. The cited case was decided as a case stated, the facts being stipulated. It, moreover, arose under a different act of Congress. *The agreed fact* was that the *capital* of the bank in that case was *invested in securities which had no relation to banking*, and that all the funds of the bank which were in any way used or employed in banking were moneys belonging to depositors, *and that no part of the capital or surplus of the bank was so used or employed*. It was no part of the duty of the court—indeed, it was powerless—to change the effect of the stipulation. The agreed fact being that the banking business was carried on without any capital being employed, the court could not do otherwise than rule that no tax was payable. This is a very different thing from ruling as a matter of law that, if some of the moneys of a bank were invested in commercial paper, and some in other forms of investment, and if the aggregate investments in commercial paper do not exceed the aggregate sum owing to depositors, no part of its capital is used or employed in banking.

There are at least two seemingly unsurmountable obstacles in the way of reaching such a conclusion. One is how the character of the investments in which the banker puts his money can make any difference. * * *

It must be, however, that granted one is a banker and has money in the banking business, the character of the investments he makes of these moneys can have no bearing upon the question of the amount of capital he has invested in that business.

> The other obstacle is the utter impossibility of its being held as a matter of law that the capital, surplus, or undivided profits of a bank, either separately or in a lump, can be segregated from its other assets and identified as such. The loose phrases in common use which might seem to imply such a possibility it is well understood do not. A bank or trust company might be said to have invested its surplus in the erection of a banking house or an office building. Everyone understands that all that is meant by this is that it has so invested a sum equal to a certain part of its estimated accumulated profits. Surplus, and kindred words, are nothing more than banking expressions. It is certainly clear that in no legal sense can either capital or surplus be earmarked as a concrete thing. The answer to the retort of counsel that "this company plaintiff not only can do it, but has done it," is an obvious one.

I want to call especial attention to the fact, that this court says, that in the *Treat case* "It was agreed that no part of the capital or surplus of the bank was so used or employed. It was no part of the duty of the court, indeed it was powerless to change the effect of the stipulation." In the case at bar, the Court of Claims found just the opposite. The court further said "*the agreed fact being that the banking business was carried on without any capital being employed*, the court could not do otherwise than rule that no tax was payable."

This case was reversed by the Court of Appeals because the lower court excluded certain evidence, which no doubt should have been admitted. But to my mind the reasoning is correct.

In the case of *Central Trust Co., of New York*, v. *Treat*, 171 Fed. 301, the court says that the "plaintiff *is not a bank or banker*, but does some of the things enumerated in the section as indicative of such business"; and that the only question is, "whether the tax is payable on $11,078,355.29, being accumulated and undivided profits resulting from the conducting of the business of complainant for many years."

In the case at bar, appellant is a banker, handling millions in the banking business.

In the Treat case the evidence does not show that any part of these millions *had been accumulated* in the banking business.

In the case at bar, all net profits from the banking business were carried to the undivided profits of the company, and the greater part of the deposits were put in *permanent investments*, and locked in its vault.

What the word surplus means in the act of 1898.

In the case of *Leather Manufacturers' National Bank* v. *Treat*, 116 Fed., 774, 775, 776, the court said:

> (P. 775.) The only question presented is whether the word "surplus," as used in the phrase "in estimating capital surplus shall be included," is to be construed as having some restricted meaning, or in its natural and ordinary sense, as including the entire overplus of assets over liabilities.

> (P. 776.) And it would seem absurd to hold, though it seems to be a natural corollary from the propositions advanced by plaintiff, that a board of directors could set aside large sums each year from the profits, accumulating an additional fund equal perhaps to the capital, and used in the same way and escape the tax upon it by the simple device of calling it "undivided profits." It would seem, rather, that Congress *used the word "surplus" in its ordinary sense, as indicating the amount left over after setting aside sufficient of the assets of a banker to meet his liabilities.*

The case of *Real Estate Title Ins. & Trust Co.* v. *Lederer* (C. C. A. 3d Cr.), 263 Fed. 667, is relied upon by appellant to sustain its theory in the case at bar, but that case is to be distinguished for the reason that the question before the court there was the failure of the trial court to admit evidence tending to show in what proportion plaintiff's capital, surplus, and undivided profits were used or employed in the various departments of its title, trust, safe-deposit, real estate, and banking business, and the court held that to be a question of proof. Which was correct. In the case at bar appellant has had the benefit of the holding of that case and has failed, under the proof, to make out a case which warrants a recovery.

In the case of *Selden* v. *Equitable Trust Co.*, 94 U. S. 419, the court held that the trust company was not a banker because it did none of the things enumerated in section 3407 of the Revised Statutes as constituting banking; that the bonds sold by the trust company

were its own property and it did not "receive them for sale" as an agent for a principal.

In the case of *Treat* v. *Farmers' Loan & Trust Co.*, 185 Fed. 760, 765, the Circuit Court of Appeals for the Second Circuit affirmed the decision of the trial court on a finding that the capital and surplus were not used or employed in banking. Appellee does not agree with the conclusion reached in that case, but the question there involved and decided is not involved in this case, for the reason that in the case at bar the lower court found that the capital and surplus of this appellant were used and employed in banking. There is nothing in the Treat case to show that the *deposits were permanently invested.*

Anderson v. *Farmers' Loan & Trust Co.*, 241 Fed. 322, 327:

> The case at bar seems somewhat different. In the first place, it is doubtful if any such occasion for the existence of the investments appeared in the Spreckels case as in the case of a banking institution where large reserves are so important to the conduct and success of business. These investments, as the undivided profits in the case of *Leather Manufacturers' Bank* v. *Treat, supra*, are all to be regarded as employed in the business of the company.
>
> In the case at bar the tax is levied on capital employed in banking and not upon income derived from the banking business. Assets may be employed in the business of banking, when dividends derived from them are not receipts from the banking business at all. In

other words, the terms of the statute regulating the tax in the Spreckels case were different from those in the act determining the tax for the case at bar. The Spreckels case, therefore, never decided that the *deposits and securities of that company were not employed in the business of refining sugar*, but only held that income derived from those assets could not properly be regarded as coming within the definition of *receipts from the business of refining sugar*.

B.

BURDEN OF PROOF TO SHOW THE TAX WAS NOT DUE.

The appellant had the burden of establishing by a preponderance of the evidence that the tax collected, or some part of it, was not due, and it is most respectfully insisted that the appellant has not established this fact.

It must be assumed, in the absence of proof by the plaintiff to the contrary, that the taxes were legally and properly assessed and were due and payable. The presumption at the outset is that plaintiff's capital and surplus upon which the tax was computed were used or employed in the banking business. To recover plaintiff must adduce evidence competent to refute the prima facie case established in favor of the defendant by the assessments.

Mr. Justice Hunt, in *Arthur* v. *Unkart*, 96 U. S. 118, at page 122, referring to the presumption of correctness which follows a decision of a collector of customs that articles are dutiable at a certain rate, said:

> These officers are, however, selected by law for the express purpose of deciding these questions; they are appointed and required to pronounce a judgment in each case; and the conduct, management, and operation of the revenue system seem to require that their decisions should carry with them the presumption of correctness. This rule is not only wise and prudent, but is in accordance with the general principle of law that an officer acting in the discharge of his duty, upon the subject over which jurisdiction is given to him, is presumed to have acted rightly.

In the case of *Canal & Banking Co.* v. *New Orleans*, 99 U. S. 97, the court said:

> In this suit the burden of proof is on the bank to show that it has been unlawfully taxed. The decision of the assessor must stand unless it can be affirmatively controverted.

In *Bailey* v. *Railroad Company*, 22 Wall. 604, which was a suit brought by the corporation to recover taxes paid a collector of internal revenue under the internal revenue act of June 30, 1864, Mr. Justice Clifford said, at page 638:

> Mere irregularities may be passed over without remark, as the suit is an action of assumpsit brought by the plaintiffs to recover back money which they paid to the collector, and the burden is upon them to show that the defendant *ex æquo et bono* is bound to refund the amount which they paid.

In *Shafer* v. *Craft*, 144 Fed. 907, which was a suit in the district court to recover a special tax assessed and collected from the plaintiff as a dealer in oleomargarine, Judge Evans said, at page 909:

> As some question was raised at the hearing as to the burden of proof, it may be added that in the opinion of the court it rested upon the plaintiff not only because it was, in the nature of things, quite as easy for him to prove that he did not sell colored oleomargarine as it was for the Government to prove that he did, but also because (1) plaintiff asserts the negative proposition as the basis of his claim; and (2) the presumption would arise from the facts stated in the pleadings that the officers of the United States, both here and in Washington, did their duty in ascertaining and determining the fact before making the assessment of the $48.

In *Western Express Co.* v. *United States*, 141 Fed. 28, which was a suit brought by the United States to collect special taxes that had been assessed against defendant, Philips, J., said, at page 30:

> The controlling question, therefore, for decision is whether or not there was any evidence in the case to support the finding. If there was, the verdict must stand. The action being based upon assessments made by the proper revenue officers of the Government, the law presumes that these officers proceeded regularly; that on due inquiry they ascertained the existence of the essential facts subjecting the defendant to such tax. In this respect such officers act in a quasi judicial capacity, and their action stands as prima facie correct

> until this presumption, by countervailing proof, is met and overthrown by the party assessed.

In *Schmitt* v. *Trowbridge*, Fed. Cas. No. 12468, Judge Brown, in his charge to the jury, said:

> In determining these tax cases the Government is entitled to certain presumptions. It is a matter of necessity that it should be so. For instance, I charge you that, where the Commissioner of Internal Revenue makes an assessment of this kind, the presumption is that the assessment is correctly made.

In the comparatively recent case of *Anderson* v. *Farmers' Loan & Trust Co.*, 241 Fed. 322, at page 329, the court said:

> In order to recover any part of the taxes the Farmers' Loan and Trust Company should have shown just what portion of the tax was levied upon capital, surplus, and undivided profits which were not used or employed in banking. It was not sufficient to show that the commissioner proceeded without proper evidence, or otherwise erroneously, and then rest; but the company had the burden of establishing by a preponderance of the evidence that the tax collected, or some part of it, was not due.

III.

THE ACTION IS BARRED BY LIMITATIONS.

In the instant case the plaintiff, acting under the provisions of act of July 27, 1912, c. 256, 37 Stat. 240, presented to the Commissioner of Internal

Revenue on November 22, 1913, its claim for the refund of taxes alleged to have been erroneously or illegally collected under the war revenue act of 1898. This claim was rejected in April, 1917, and suit was filed on July 25, 1918. It is submitted that this cause of action was barred by the operation of the statute of limitations.

Had this action been brought prior to the enactment of a refunding act it is clear that the action would have been barred by section 3227 of the Revised Statutes, two years after the cause of action had accrued. The applicability of section 3227, R. S., is clear and undoubted. (*Christie-Street Commission Co.* v. *U. S.*, 136 Fed. 326).

The question now arises whether the enactment of the act of 1912 has created a situation which is not amenable to the bar set up in section 3227, R. S. The plaintiff urges that its cause of action would not be barred by the operation of any statute of limitations until January 1, 1920, and in support of this contention cites the following cases:

U. S. v. *Hvoslef*, 237 U. S. 1.
Sage v. *U. S.*, 250 U. S. 33.
Kahn v. *U. S.*, No. 52, October term, 1921.

An examination of the Hvoslef and Sage cases indicates that the act of 1912 created new rights. The exact nature and juridical import of these new rights are not clearly set forth, however. Further inquiry thus becomes necessary to determine the nature of the right upon which the cause of action is based

and the relation between the act of 1912 and section 3227, R. S.

The act of 1912 was a statute passed for the benefit of persons who had paid certain taxes which were not properly collectible, and one of the new rights which that act created was the right of such taxpayers who had complied with the terms of the statute to recover from the United States such sums of money as had been erroneously or illegally collected from them in the form of taxes, even though such taxes had not been paid under protest. Hitherto protest at the time of payment of the alleged illegal tax was essential to recovery. (*Hvoslef* v. *U. S.*, 237 U. S. 1.)

Another new right created by the act of 1912 was the right to obtain a refund from the United States without filing anew the claim with the Commissioner of Internal Revenue in case the claim had already been presented to the commissioner prior to the enactment of the act of 1912. (*Sage* v. *U. S.*, 250 U. S. 33.)

The act was passed, as shown by its title, to extend the time for the repayment of certain war-revenue taxes erroneously collected, and thus was the bar temporarily suspended. The interest of the claimant remained the same, but it was given vital force and effect by the new and additional remedy provided for by the act of 1912.

The aforesaid facts and the further fact that when money is repaid to a claimant it is on the assumption, not of bounty, but that money erroneously collected as taxes is being repaid (*Coleman* v. *U. S.*,

250 U. S. 30), these facts show clearly that when suit is brought upon such a claim, it is a suit for the recovery of a tax erroneously or illegally collected, and within the terms and meaning of section 3227, R. S.

Presumably it is on the theory that since the act of 1912 created new rights, section 3227, R. S., is contended by plaintiff to be inapplicable. Yet in none of the decisions has it been affirmatively stated that such a rule of law obtains, unless it be the case of *Sage* v. *U. S.*

When the Court of Claims passed upon the case at bar it based its decision upon the *Union Trust Co.* v. *United States*, 55 C. Cls. 424. In that case the court said, at page 429:

> We do not lend assent to the proposition that the tax in question was not placed upon the capital used or employed in the business of banking when there were other kinds of business dealt in by the same person or corporation. The statute does not require or direct that all the capital be used or employed in a particular line of business. It defines a banker and lays a tax on the banker using or employing a capital, graduating it according to the amount of capital and surplus. It taxes alike "every incorporated or other bank" and "every person, firm, or company" having a place of business where certain credits are opened. It does not undertake to say that every dollar of the capital and surplus of the banker, as defined in the act, shall be employed or used in the banking business. It

accords to him the right, if he chooses, of locking up his entire capital in his strong box or in using or employing it in strictly banking business, or in otherwise using or employing it. But if he does the business of a banker he is taxed on the amount of the capital which he uses or employs in his business, of which that of banking may be but a part. It is the one person or firm or company or bank which is taxed, and the capital used or employed can be ascertained. It was not contemplated by the act that a firm, company, or bank engaging in several lines, and being a banker, could escape the tax under a claim that only a part of its capital and surplus was used or employed by it, acting as a banker. The act fixes the tax upon the banker "using or employing" a capital. The two words are not to be accorded the same meaning. Using a certain capital implies it is being made use of, while employing a certain capital does not mean an actual use of it, but rather the having it available for use when and as needed or desirable.

The question of the statute of limitations has been called to our attention by the defendant. We think that the action predicated upon this claim is barred. We base this opinion upon the decision rendered in this court on April 5, 1920, in the case of *Kahn et al.* v. *United States*, *ante*, p. 271.

The petition must be dismissed, and it is so ordered.

Upon the question of *limitations*, when the Court of Claims decided the Union Trust Company case, it

referred to and based its opinion upon the case of *Otto H. Kahn et al., Ex'rs*, v. *United States* (55 C. Cls. 271). In the Kahn case the court said, at pages 284, 285, and 286:

> The next preceding claim (Finding XIII), and the only one left for consideration, was filed April 4, 1904, by Otto H. Kahn, one of the executors. We are mindful of what has been said by the Supreme Court in the Sage case, 250 U. S. 33, but since some doubt exists in our minds as to the application of the rule laid down in that case, under the facts as they appear in the instant case with reference to the consideration of this claim as a proper basis for this action, we venture to suggest the provisions of the statute which seem to us clearly to bar any action predicated upon this claim. We quote sections 3226 and 3227 of the Revised Statutes:
>
> "Sec. 3226. No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of (the) Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the commissioner has been had therein: *Provided*, That if such decision is delayed more than six months from the date of such appeal, then the said suit may be

brought without first having a decision of the commissioner at any time within the period limited in the next section."

"Sec. 3227. No suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, shall be maintained in any court unless the same is brought within two years next after the cause of action accrued: *Provided*, That actions for such claims which accrued prior to June six, eighteen hundred and seventy-two, may be brought within one year from said date; and that where any such claim was pending before the Commissioner, as provided in the preceding section, an action thereon may be brought within one year after such decision and not after. But no right of action which was already barred by any statute on the said date shall be revived by this section."

Section 3227 prohibits the maintenance of any suit *in any court* unless the same is brought within two years next after the cause of action has accrued. This claim was filed April 4, 1904. The cause of action accrued under the statute when the Commissioner of Internal Revenue rejected the claim or, if he did not act, when his decision thereon had been delayed for more than six months. The claim in part rejected was not refiled under the act of 1912, and no action was had thereon after its original rejection by the Commissioner

of Internal Revenue. But conceding that the right of action thereon was revived by the act of 1912 and applying the holding in the Sage case, that until January 1, 1914, no statute of limitations could begin to run, which as to this case must be regarded as a liberal holding, it is still apparent that under section 3227 no action could be maintained with this claim as its basis unless it were brought on or before January 1, 1916. This action was commenced July 2, 1917. The general statute of limitations in this court (section 156, Judicial Code) is not permissive in form in the sense that it specifically permits *any action* of which this court has jurisdiction to be brought at any time within six years, notwithstanding any other statute, but it forever bars any claim unless sued upon or transmitted within six years, and hence there is no necessary conflict between it and the provisions of section 3227, applicable to a particular class of cases, prohibiting the maintenance of any suit of this character *in any court* unless brought within two years. *Fort Pitt Gas Co.* v. *United States*, 49 C. Cls. 224 at 234, citing *Christie-Street Com. Co.* v. *United States*, in the Circuit Court of Appeals for the Eighth Circuit, 136 Fed., 326, in which it was said: "It is an action directly against the United States, and the logical and unavoidable conclusion is that it was barred by the limitation of section 3227, because it was not commenced until more than two years after the cause of action it presents accrued." And the last-named case is cited with approval in *United States* v. *Emery*, 237 U. S. 28–32,

> although it was a jurisdictional question in this class of cases there under discussion, and it is said, as to these cases, that they are "founded upon the revenue law" of which section 3227 is a part. But for the Sage case, we would entertain the opinion that there could be no question that an action predicated upon this claim was barred in two years, and we entertain such doubt as to whether the Supreme Court intended under such circumstances to substitute the six-year statute of limitations in this court for the express provision of section 3227, that we venture to suggest the question.

The Kahn case was appealed to this court, but the court affirmed the decision of the lower court without mentioning the question of limitations.

United States v. *Hroslef*, 237 U. S. 1.

The above case is cited by appellant as holding that he is not barred by the statute of limitations. On page 8 the court says:

> The Government contends that the court erred in deciding (1) that the court had jurisdiction of the case, (2) that it need not be averred or proved that the tax was paid under protest, and (3) that the tax was invalid.

The decision does not give the dates so as to be able to determine as to whether or not the statute of limitations applies, but from the court record the following appears:

> (*a*) The tax for which suit was filed was paid under the war revenue act of 1898.

(*b*) The Commissioner of Internal Revenue rejected the claim for refund January 22, 1913.

(*c*) Suit was filed February 11, 1913.

(*d*) The district court heard the case August 28, 1913.

Consequently no statute of limitations could be invoked in this case and no such question could be made or that issue be considered by this court.

The court does say that an action on the refunding act of 1912 is "founded upon a law of Congress within the meaning of the provisions of the Tucker Act," so as to give the District Court jurisdiction. To sustain this statement the court cites *Medbury* v. *United States* (173 U. S. 492). In that case the court said (pages 496 and 497):

> Congress has from time to time passed laws on the subject of the revenue, which not only provide for the manner of its collection, but also point out a way in which errors can be corrected. These laws constitute a system which Congress has provided for the benefit of those persons who complain of illegal assessments of taxes and illegal exactions of duties. In the administration of the tariff laws, as we have seen, the Secretary of the Treasury decides what is due on a specific importation of goods, but if the importer is dissatisfied with this decision, he can contest the question in a suit against the collector, if, before he pays the duties, he tells the officers of the law, in writing, why he objects to their payment.

And again the court said:

> Can it be supposed that Congress, after having carefully constructed a revenue system, with ample provisions to redress wrong, intended to give to the taxpayer and importer a further and different remedy? The mischiefs that would result, if the aggrieved party could disregard the provisions in the system designed expressly for his security and benefit, and sue at any time in the Court of Claims, forbid the idea that Congress intended to allow any other modes to redress a supposed wrong in the operation of the revenue laws than such as are particularly given by those laws.
>
> The system spoken of in the opinion provided a general scheme for the collection of the revenue, and also provided adequate means for the correction of errors by a resort to a suit in a court of law prosecuted in the ordinary way. While it gave rights, it provided a special but full and ample remedy for their infringement. It certainly could never be presumed that Congress, while thus furnishing an adequate method for the correction of errors, intended that the party aggrieved might refuse to follow such remedy and resort to some other and different mode of relief. It is quite plain that the remedy thus specially indicated was exclusive, and that the act giving jurisdiction to the Court of Claims had no application.

To sustain that same statement the court also cited *McLean* v. *United States* (226 U. S. 374). This case does not mention the statute of limitations.

Sage v. *United States* (250 U. S. 33).

This case is not against the contention of the Government and the decisions of the Court of Claims, that the case at bar is barred by section 3227 of the statute of limitations.

As the Government is advised that the decision in the case at bar will virtually decide about 200 cases, involving over $1,000,000, we respectfully ask the court to distinguish between the Sage case and the case at bar, and to consider said section 3227.

In the Sage case the court seems to base its finding upon the case of *James* v. *Hicks* (110 U. S. 272). We respectfully submit that that case throws no light upon this question. In that case the refunding statute of 1872 provided that "an action thereon may be brought within one year after such decision and not after." (The decision of the commissioner.) The commissioner decided the appeal on January 22, 1879. Hicks brought his suit on August 15, 1879—within the year—and the court held that he was within the statute.

I can not understand what bearing the Hicks case had upon the question at issue in the Sage case. There is no doubt but what the statute of 1912 did give appellant additional rights, but the Government believes that those rights do not interfere with the statute of limitations as set forth in the law relating to revenue, as decided in the Medbury case.

In the case at bar the appellant has been guilty of great laches. The refunding act was passed July 27, 1912. The claim was filed November 22, 1913, when about one year and four months had elapsed of the

year and five months given in which to file the claim with the commissioner.

The claim was disallowed by the commissioner April 16, 1917. This action was brought July 25, 1918, over four years after suit could have been brought. First, there was a delay of one year and four months, leaving only one month in which to act; and then there was a delay of over four years; because under the statute, this suit could have been brought at the end of six months after the claim was filed with the commissioner.

In the Medbury case this court said that the act giving jurisdiction to the Court of Claims had no application. We insist that the same reasoning should be applied in this case, and that the statute of limitations in the Court of Claims act should be construed in the language of Judge Downey in the Kahn case (p. 286), to wit:

> The general statute of limitations in this court (section 156, Judicial Code) is not permissive in form in the sense that it specifically permits *any action* of which this court has jurisdiction to be brought at any time within six years, notwithstanding any other statute, but it forever bars any claim unless sued upon or transmitted within six years, and hence there is no necessary conflict between it and the provisions of section 3227, applicable to a particular class of cases, prohibiting the maintenance of any suit of this character *in any court*, unless brought within two years. *Fort Pitt Gas Co.* v. *United States*, 49 C. Cls. 224 at 234,

> citing *Christie-Street Com. Co.* v. *United States*, in the Circuit Court of Appeals for the Eighth Circuit, 136 Fed. 326, in which it was said: "It is an action directly against the United States, and the logical and unavoidable conclusion is that it was barred by the limitation of section 3227, because it was not commenced until more than two years after the cause of action it presents accrued."

In the Sage case this court was only asked to consider section 1069, R. S., which is the six-year limitations statute in the Court of Claims act. The Government took the position then that said limitations began to run when the application for a refund was made. This application was made in August, 1903.

> All the cases cited in the Sage case on the limitations question were upon the point that the statute began to run *when the application was filed*. Hence the statute of limitations which we are now asking the court to consider was not presented nor passed upon in the Sage case. Consequently we are asking the court to distinguish the case at bar from the Sage case.

Rice v. *United States*, 122 U. S. 618, the court said:

> While Congress had declared a general limitation of six years for "every claim cognizable by the Court of Claims," and a still shorter one of two years, for claims under the captured or abandoned act, it is unreasonable to infer that it intended to confer upon every claimant under the act of 1877 * * *.

The above clearly holds that the general statute (sec. 1069, R. S., sec. 156, Judicial Code) of six years,

and the special statute (sec. 3227, R. S.) of two years, both apply to Court of Claims cases.

Christie-Street Commission v. *United States*, 136 Fed. Rep. 136:

> (Pages 327–8.) SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.
>
> The case presents two questions: May one whose claim for a repayment of internal taxes illegally collected has been presented to, but has not been allowed by, the Commissioner of Internal Revenue (section 3226, Rev. St., 2 U. S. Comp. St. 1901, p. 2088) maintain an action against the United States to recover these taxes under the act of March 3, 1887 (24 Stat. 505, c. 359, 1 U. S. Comp. St. 1901, pp. 752, 753)? If so, does the limitation of two years fixed by section 3227, Rev. St., U. S. Comp. St. 1901, p. 2089, or the limitation of six years provided by section 1 of the act of 1887, fix the time within which the action may be successfully brought?
>
> Sections 3220, 3226, 3227, Rev. St., U. S. Comp. St. 1901, pp. 2086, 2088, 2089, are a part of the system of laws enacted by Congress for the collection of the taxes imposed to obtain the internal revenue of the government, and to adjust the claims for excessive payments exacted by the officers of the nation. By these sections the Commissioner of Internal Revenue is authorized to—
>
> "Pay back all taxes erroneously or illegally assessed or collected * * * also to repay to any collector or deputy collector the full amount of such sums of money as may be

recovered against him in any court, for any internal taxes collected by him." Section 3220.

They also provide that:

"No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously assessed or collected * * * until appeal shall have been duly made to the Commissioner of Internal Revenue * * * and a decision of the commissioner has been had therein: *Provided*, That if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the commissioner at any time within the period limited in the next section." Section 3226.

Section 3227 declares that:

"No suit or proceeding for the recovery of an internal tax alleged to have been erroneously or illegally assessed or collected * * * shall be maintaned in any court unless the same is brought within two years next after the cause of action accrued."

The act of March 3, 1887, was conceived and passed with no special reference to claims for taxes illegally collected for revenue purposes, but to authorize the adjudication of four general classes of claims against the United States in the Court of Claims and in the Circuit and District Courts. It gave to those courts jurisdiction of—

"All claims (1) founded upon the Constitution of the United States or any law of Congress, except for pensions; * * *"

(Page 328.) It is conceded on all sides that, if this action can be sustained at all, it is because it is of the first class, and that its maintenance is conditioned by the true answer to the inquiry whether or not it is "founded upon any law of Congress."

(Page 330.) The decisions of the Supreme Court upon the specific question before us evidence a constantly increasing tendency to adopt this view.

In the year 1868, in the case of *Nichols* v. *U. S.*, 7 Wall. 122, 131, 19 L. Ed. 125, that court held "that cases arising under the revenue laws were not within the jurisdiction of the Court of Claims."

In the year 1877, in *U. S.* v. *Kaufman*, 96 U. S. 567, 24 L. Ed. 792, it held that its declaration in the Nichols case was too broad, and that the act of 1855 gave the Court of Claims jurisdiction of an action upon a claim for taxes illegally collected, which had been allowed by the Commissioner of Internal Revenue.

In 1881, in *U. S.* v. *Savings Bank*, 104 U. S. 728, 734, 26 L. Ed. 908, it affirmed this decision.

In the year 1900, Dooley, Smith & Co. had brought an action against the United States in the Southern District of New York to recover back certain taxes illegally exacted from them upon merchandise imported into Porto Rico from New York.

(Pages 230–1.) In the cases under consideration the argument is made that the money was tortiously exacted, that the alternative of

payment to the collector was a seizure and sale of the merchandise for the nonpayment of duties, and that it mattered not that at common law an action for money had and received would have lain against the collector to recover them back. But whether the exactions of these duties were tortious or not—whether it was within the power of the importer to waive the tort and bring suit in the Court of Claims for money had and received, as upon an implied contract of the United States to refund the money, in case it was illegally exacted—we think the case is one within the first class of cases specified in the Tucker Act, of claims founded upon a law of Congress, namely, a revenue law, in respect to which class of cases the jurisdiction of the Court of Claims, under the Tucker Act, has been repeatedly sustained.

In the year 1903, in the case of *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, 406, 407, 24 Sup. Ct. 376, 378, 48 L. Ed. 496, that court said of an action against the collector of internal revenue to recover taxes illegally exacted:

"This suit was cognizable by the Circuit Court, under the judiciary act of 1887–88, as one arising under both the Constitution and the laws of the United States, 25 Stat. 433, c. 866. It arose under the Constitution, because the plaintiff's cause of action, as disclosed in its statement of demand, has its sanction in that instrument, if it be true, as alleged, that the act of 1898, under which the defendant proceeded when collecting the taxes

in question, is repugnant to the Constitution. And it arose under the laws of the United States because it arose under a statute providing for internal revenue."

(Page 331.) A claim to recover back internal taxes illegally exacted under a misconstruction of the war revenue law of 1898 is a claim founded upon a law of Congress, within the true meaning of the act of March 3, 1887; and it may be enforced by an action directly against the United States under that act after it has been presented to the Commissioner of Internal Revenue, whether it has received his approval or not, and whether it is an action on a contract or an action sounding in tort.

(Page 332.) Is the time for the commencement of such an action to enforce a claim to recover back internal taxes illegally collected limited by the two years fixed by section 3227 of the Revised Statutes (U. S. Comp. St. 1901, p. 2089), or does the time extend to the six years prescribed by section 1 of the act of 1887?

(Pages 332–3.) When the act of 1887 was passed there was, and had been for many years, a code of laws which prescribed the rights and duties of the officers of the United States and of its citizens in the assessment, ascertainment, and collection of internal revenue requisite to support the Government, and in the adjustment of claims for excessive payments. Sections 3220, 3226, and 3227 constituted a part of this system of laws which related to this specific subject. They prescribed and limited the means by which one

might recover back from the United States internal taxes which had been illegally exacted from him. Section 3227 provided that no suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected should be maintained in any court unless it was brought within two years next after the cause of action accrued. The adjustment and collection of taxes and of claims for excessive payments on account of such assessments was not the primary subject of the act of 1887. That act was a general law passed for the purpose of conferring jurisdiction of actions upon numerous classes of claims upon certain courts of the United States. It contained a limitation in these words:

"Provided that no suit against the Government of the United States shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made." U. S. Comp. St. 1901, p. 752, c. 1.

Section 16 of the act provides that all laws and parts of laws inconsistent with its provisions are repealed.

If Congress had affirmatively declared by this law that all actions allowed under it might be commenced at any time within six years after their respective causes accrued, there might be some chance for an argument that there was an inconsistency between the limitation of this act and that of section 3227 which would work a repeal of the latter. But there is certainly no repugnancy between a

general law to the effect that no action upon any of several classes of claims shall be brought after six years from the accrual of the cause of action and a statute that no action upon any of a specific class of these claims shall be sustained unless it is commenced within two years of the time when the cause of action arose; and, as there is no inconsistency between the two limitations, the act of 1887 neither repealed nor modified the provision of section 3227.

(Page 333.) All statutes in pari materia are to be read and construed together, as if they formed part of the same statute and were enacted at the same time. Potter, Dwar. St. 145. When the two limitations are read in accordance with the latter rule, all doubt that they are both in force and that they are consistent with each other is instantly dispelled.

Since the year 1872 the time within which such actions could be successfully brought has been limited to two years after the respective causes of action accrued. Act June 6, 1872, c. 315, § 14, 17 Stat. 257; section 3227, Rev. St., 2 U. S. Comp. St. 1901, p. 2089. This class of actions, the class founded on a law of Congress, was not enlarged by the act of 1887, but it remained bounded by the same limits and conditioned by the same words after as before the passage of that act. The action in hand is one of this class. It rests upon a claim founded on a law of Congress, which was presented to the Commissioner of Internal Revenue pursuant to the provisions

> of section 3226. It is an action directly against the United States, and the logical and unavoidable conclusion is that it was barred by the limitation of section 3227, because it was not commenced until more than two years after the cause of action it presents accrued.

The above case squarely supports the Government's contention that the two years' statute of limitations applies.

Chapter 140, act approved March 4, 1915, volume 38, Statutes at Large, page 996, provides:

> Sec. 5. * * * Nor shall said Court of Claims have jurisdiction of any claim which is now barred by the provisions of any law of the United States.

It seems that this statute should also be a bar.

WHEN THE RIGHT TO SUE ACCRUED.

In *Rice* v. *United States*, 122 U. S. 617, the court said:

> A claim first accrues, within the meaning of the statute, when a suit may first be brought upon it.

In *Schwarzchild, etc., Co.* v. *Rucker*, 143 Fed. 656, the court said:

> (Page 658.) The very language which fixes the right to sue within six months, if the commissioner shall fail to act within that time, refers also to the limitation period, and it is evident that the cause of action accrued after the expiration of six months from the time of entering the appeal. I think that this is about as clear as anything can be.

The cause of action in the instant case accrued on May 22, 1914, when the claimant was first given the right to start suit pending the delay in the decision of the Commissioner of Internal Revenue upon the application for a refund (sec. 3226, R. S.; *Schwarzchild & Sulzberger Co.* v. *Rucker*, *supra*; *Rice* v. *United States*, *supra*), hence this suit was barred since it was not filed until July 25, 1918, more than two years after the expiration of the period in which suit could be brought without encountering the prohibition of section 3227, R. S.

It is respectfully submitted that this action has been barred by section 3227, R. S., and by section 5 chapter 140, *supra*, of March 4, 1915, 38 Stat. L. 996, *supra*.

CONCLUSIONS.

Appellant's banking business was carried on in its $600,000 office building. What part of its building was so occupied does not appear; it might have occupied three-fourths of it so far as the evidence is concerned.

There is nothing in this record to show how much of the money on deposit was converted into interest-bearing securities and placed in appellant's vaults; nine-tenths of it might have been.

This action is barred by section 3227. R. S.

It is barred by section 5, chap. 140, *supra*.

The war revenue act of 1898 was a war measure passed for the purpose of obtaining funds to fight the common enemy. Our Nation's very existence was at stake. Laws were hurriedly drafted and speedily

passed, often by unanimous vote and with little or no debate, to meet financial emergencies.

But they were all passed for the one great purpose, to save our common country.

The effect, naturally and properly, was to separate these great corporations from a very small part of their incomes, to support our citizens who were separated from their homes, their loved ones, their business and property, and sent away to face the shot and shell of the enemy.

In my opinion, these war measures should be interpreted so as to produce the effect desired by Congress; and if any banker is unpatriotic enough to attempt to defeat the intent and purpose of this law, and thus avoid paying his just share toward the war expenses of this Government, which places its protecting arm around him and enables him to accumulate great wealth, this court should inject a little patriotism into his veins by compelling him to bear his small part of the war expenses, while his fellow citizens were freely offering their lives for their country and for his good.

Suppose this tax had been assessed upon the capital and surplus employed in any other branch of its business—its surety, safety deposit, or trustee business.

Take, for instance, its surety business. Appellant could have come into court and made exactly the same showing as it has made in this case. Its capital stock and surplus all invested in securities

and locked in its vaults! And upon its theory of defense the Government could not recover.

And so, with every branch of its business. And if the defense is good in this case, its capital and surplus are beyond the reach of the revenue statute.

This is the only conclusion to which the contention of the appellant herein leads us. It can not be right; it certainly is not just.

Respectfully submitted.

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In the Supreme Court of the United States.

OCTOBER TERM, 1921.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, appellant,
v.
THE UNITED STATES.
No. 207.

APPEAL FROM THE COURT OF CLAIMS.

APPELLEE'S SUPPLEMENTAL BRIEF.

In its reply brief appellant seems to think that appellee should not have spoken of the deposits as being permanently invested. Appellee took the position and still maintains that as the appellant says that the capital stock and surplus were permanently invested because they were invested in bonds, stocks, etc., and locked in its vaults, the deposits were just as permanently invested because they were also invested in stocks and bonds, kept in separate envelopes and placed in the company's vaults in just the same manner.

Appellant also excepts to appellee's statement that the profits from its banking business amounted to

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over $570,000 in the four years. It seems to think that appellee should have used the word "income." Webster's New International Dictionary defines the word "income" as follows:

> The total receipts from any branch of business are known as the *gross* income. That portion of the receipts which remain after paying wages and for materials is known as *net* income.

Appellee, of course, meant the gross profits. The amount of profits very plainly appears on page 21 of the transcript and appellee could have had no sinister purpose in speaking of the gross profits as profits, as long as appellee did not call them net profits.

Appellee is perfectly willing to stand corrected on the fact that instead "of a *part* of the deposits being invested," *all* of the deposits were invested in stocks, bonds, etc.

Appellant also complains because appellee said "that securities representing the investments of *much* of plaintiff's capital assets were kept in separate packages." Appellee still insists that *much* of the capital was so invested. But contrary to the argument of appellant, appellee believes that all of the assets of appellant constituted its capital.

Appellant cites the case of *Henry, Executor,* v. *United States,* 251 U. S. 393, as sustaining its contention that the statute of limitations does not govern in the case at bar. From the decision in that case, I can not learn why or how the question of limita-

tions is raised. It is apparent, however, that whatever question was raised by the Government was waived by the Solicitor General. This being true, the question was not considered by the court and there is nothing in that case to guide the court in considering the two-year statute in the case at bar.

In the case cited by appellant, entitled *Tiffany, Executor*, v. *United States* (252 U. S. 590, 55 C. Cls. 519, 534), nothing appears in any one of those references to show what error was confessed in the upper court or what question was at issue in either court.

In any event the Government does not believe that it is bound by any confession of error by any of its representatives.

Appellee is still of the very decided opinion that the judgment of the lower court should be affirmed.

Respectfully submitted.

JAMES M. BECK,
Solicitor General.
ROBERT H. LOVETT,
Assistant Attorney General.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 207.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
Appellant.

vs.

UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANT'S BRIEF IN REPLY.

While the brief for the Government in the instant case has, in the main, been anticipated by our brief already on file, there are some matters which seem to require a reply.

I.

The entire argument of the Government respecting the tax liability of appellant proceeds upon the fundamental fallacy that a statute imposing a tax under certain definitely stated specific conditions is, neverthe-

less, a tax imposed generally and without regard to these specific conditions. The statute in question imposes a tax upon bankers *using or employing a capital,* but the argument of the Government, as well as the decision of the Court of Claims, proceeds upon the theory that the tax is imposed upon any corporation engaged, among other businesses, in some of the activities defined by the statute as banking, whether its capital is actually used in these activities or not.

The argument, as well as the decision, is based upon the preceding decision of the Court of Claims in *Union Trust Co. v. United States,* cited at pages 9 and 44 of the Government's brief. In that case the Court of Claims said:

> "But if he does the business of a banker he is taxed on the amount of the capital which he uses or employs in his business of which that of banking may be but a part. It is the one person or firm or company or bank which is taxed and the capital used or employed can be ascertained * * * The act fixes a tax upon the banker using or employing a capital. The two words are not to be accorded the same meaning. Using a certain capital implies its being made use of, while employing a certain capital does not mean an actual use of it but rather the having it available for use when and as needed when desirable."

We submit, on the contrary, that the two words "using" or "employing" do mean substantially the same thing. They are both words implying action. One of the definitions given by the dictionaries (for example, Webster) of the verb "use" is "to employ." And one of the definitions of the verb "employ" is "to use." In popular understanding the two words are

synonymous and interchangeable and express substantially the same meaning. The Anger Head, 46 Fed. Rep., 664. The Court could have said with equal plausibility that "employing" a certain capital implies its being employed, while "using" a certain capital does not mean the actual employment of it but rather the having it available for use or employment when and as needed or desirable. The use of two or more synonymous words in a statute is not at all infrequent, though the statute would mean the same if only one of the words were used. The contention of the Government and the decision of the Court of Claims, is completely answered, as we think, by the Circuit Court of Appeals in *Treat v. Farmers Loan & Trust Co.*, 185 Fed., 760, 762, where the only banking business done by the company was precisely the things which were done by the appellant here, in the following language:

> "This business is done entirely by means of the depositors' money. As the act only taxes the capital used or employed in banking we think the Circuit Judge was entirely right in holding as a matter of law that the plaintiffs not using their capital or surplus in banking were not subject to the payment of any tax thereon."

It will be observed that the Court treats the words "using or employing" as meaning the same thing, since it is said "that the plaintiffs not *using* their capital" were not subject to a tax. The Court proceeds:

> "No doubt they got credit by the amount of their capital and surplus, but Congress evidently intended to put corporations on the same basis as

> individuals, and it would be obviously very unfair to tax an individual upon his whole fortune because he was *using* part of it in a banking business."

Nevertheless, in the case of an individual, as in the case of a corporation, his whole wealth is *available* for use, and his whole wealth may be called upon to answer for any liability which he incurs in the banking business. If Congress had intended to tax capital or surplus, irrespective of its *actual use*, it would have been easy to say so, as it did say in the Act of 1866, referred to in our original brief.

The vice of the decision of the Court of Claims is that while the law, in plain terms, makes the tax depend upon an actual use or employment of capital or surplus, the Court makes it depend upon the ownership or possession merely. We think it is safe to say that none of the cases cited by us or by the Government, is authority for that conclusion. Even the case of *Anderson v. Farmers Loan & Trust Co.* (241 Fed. 322), which is the main dependence of the Government, does not question the interpretation of the statute made in the Treat case; indeed, both decisions were rendered by the same Court, Circuit Judges Coxe and Ward sitting in both cases. The Anderson case is distinguished from the Treat case, and the rule of law laid down in the latter held not applicable to the facts in the former. The facts, however, in the Treat case are substantially identical with the facts found by the Court of Claims in the instant case, the only difference being that in the Treat case the facts were agreed upon, and in the instant case the facts were found by the Court.

In the Treat case it appeared:

1. That the capital and surplus were *permanently* invested in stocks and bonds.

2. That the only banking business done was the opening of credits by deposits or collections of money, and paying the same out on check, draft or order, and the loaning of money on stocks, bonds or secured paper.

3. This business was done entirely by means of the depositor's moneys.

In the instant case the Court of Claims found (1) that the money derived from the sale of capital stock and the money of the surplus fund were *permanently* invested in real estate, bonds, etc.; (2) the only banking business which the company did was to receive money on deposit from those whom it insured or bonded, which was deposited with the banking department, open credits by the deposit of money or currency subject to payment upon draft, check or order, and loan money to customers on notes secured by stocks and bonds (Finding V). From these and other findings it follows, as a necessary conclusion, pointed out in our original brief, that (3) only the depositors' money was used in carrying on this limited banking business.

It is difficult to imagine two different cases more nearly alike in all essential particulars.

It is significant in this connection that it is the Government's contention that the "surplus and capital were *employed* [not used] in the banking business *as a basis thereof.*" (Our italics.) Government's brief, page 3.

At page 9, it is urged that appellants "capital was as much *available* for banking as any other of its de-

partments, and just as *available for use when needed or desired,*" and, citing *Union Trust Co. of Indianapolis v. United States,* 55 Court of Claims, 424, as authority, the brief continues:

> "The employing of capital does not necessarily mean an actual use of it, but rather the having it available to use when and as needed or desirable."

Perhaps the fallacy of this statement has already been sufficiently demonstrated. It would seem to be obvious that being available for use or employment and actual use or employment are two entirely different things. In this connection we call especial attention not only to the Treat case, just cited, but to the more recent decision of the Circuit Court of Appeals for the Third Circuit, in *Real Estate Title, Insurance and Trust Co. vs. Lederer,* 263 Fed. Rep., 667, 669. The Court referring to a similar contention to that presented here, said:

> "Of course, these permanent investments formed part of the assets of the company as a whole, and, in case the company's banking operations proved unsuccessful, those assets would eventually have to contribute toward making up the losses of the depositors. But this fact of ultimate responsibility of all the company's assets for all of the company's liabilities did not, in our judgment constitute of itself a use or employment of those securities in the banking business for the taxing year. No such losses had occurred, and no such use or employment of its assets in other departments was made by the company in its banking operations."

The distinction between use and availability for use is well illustrated by four cases involving a tax on the use of foreign built yachts (36 Stat., 112) *Billings v. United States,* 232 U. S., 261; *Pierce v. United States,* 232 U. S. 290; *United States v. Goelet,* 232 U. S., 293; *United States v. Bennett,* 232 U. S., 299.

Mr. Justice White, speaking for the Court in all four cases, pointed out that the thing taxed was not ownership but the election of the owner to take advantage of one of the elements of ownership, the right to use, which was taxed. 232 U. S. 280. The opinion then proceeds to distinguish between that passive significance of "use," which means the mere privilege to use, and its active significance, which was the sense intended by the taxing act, that implies the actual exercise of such privilege.

> " * * * the privilege of use is purely passive, (or subjective)—a right which necessarily pertains to ownership and must exist where there is ownership as one may not obtain ownership without acquiring the privileges of use which ownership gives. The other, on the contrary, that is, use in the statutory sense, although it arises from ownership, is active (objective); that is, it is the outward and distinct exercise of a right which ownership confers but which would not necessarily be exerted by the mere fact of ownership." 232 U. S., 281.

This distinction, which was stated to be "fundamental" (p. 281), was given practical application in the second case cited. The owner of a foreign built yacht was held not liable to the tax because " * * * the yacht was not in use * * * during the year * * * but was out of commission and laid up unused * * * throughout the whole of such year." *Pierce v. United States,* 232 U. S., 290, 291.

At page 8 of the Government's brief it is stated that claimant made no protest in payment of these taxes and that the claimant has conceded that less than one-half of its capital and surplus or some portion of its capital had been used or employed in the banking business.

This Court has repeatedly decided that where a suit is brought under a Refunding Act, protest is unnecessary as shown in our original brief (*Hvoslef vs. United States,* 237 U. S., page 1).

The Court's attention, however, is called to Volume 2, of the decisions of the Commissioner of Internal Revenue, page 17, Treasury Decision No. 21,421 of July 15, 1899, wherein it appears that this Company distinctly challenged the authority of the Commissioner of Internal Revenue to impose this tax.

There is nothing in the record to indicate that claimant ever conceded that any portion of its capital or surplus was used or employed in the business of banking.

II.

We are under the always disagreeable duty of pointing out to the Court a number of misstatements to be found in the Government's brief. They are, of course, inadvertent but none the less injurious, if not corrected in the mind of the Court.

1. At page 3, in stating the Government's contentions, it is asserted that the deposits were *permanently* invested in stocks, bonds, etc. And again at page 19, it is said, "Appellants invested the deposits as *permanently* as it did its capital stock fund." Both statements are entirely without warrant. Again at page 20 these investments are referred to a number of times, as *permanent.* The Court found in the case of

the *capital stock and surplus* that the funds were *permanently invested.* (Finding IV.) But in the case of the *deposits* it found simply that they were invested (Finding VI). And it is perfectly apparent that this investment was of a temporary character since the deposits so invested were subject at any time to be withdrawn upon the checks, drafts and orders of the depositors.

2. At page 3, of the brief it is contended that these deposits were used as, and became a part of the capital. There is no foundation for this statement in any finding of the Court. If it is stated, not as a fact but as a conclusion of law, it is contrary to the decision of this Court, as well as the decisions of other Courts. In *Bailey v. Clark,* 21 Wall., 84, this Court defined the word "capital" when used with respect to a corporation or association, as applying "only to the property or means contributed by the stockholders as the fund or basis for the business enterprise for which the corporation or association was formed."

On the same page it is stated that "the profits from its banking business amounted to over $570,000 in the four years." The Court below found as a fact that the net income (or profits) derived from the banking business for the four years was $275,060.82. The Government has confused "income" with "profits" in its statement.

On the same page it is also stated that:

> "Part of the bank's profits were carried as counter cash and the balance deposited in the company's various depositaries."

Again the confusion of the two terms "profits" and "income." The Court actually found, Finding VII, at p. 22:

> "A part of the income from each department was maintained as cash and remained uninvested, part of the money being carried by the respective departments as counter cash and the balance being deposited in the company's various depositaries."

3. At page 6 of the brief, it is stated that "*a part of* the money received on deposit was invested." While this is not especially important, we call attention in passing to the fact that the Court of Claims simply found that *the money* received from deposits was invested, and so on.

4. On the same page it is said that the interest or income derived from the securities representing the deposits was utilized, first, to pay interest upon the deposits, and the balance was, *like plaintiff's other income*, carried into the profits and loss or undivided profits account. This statement is misleading because the finding of the Court is not that the *balance*, but that the *earnings*, were carried into the undivided profits account at the end of the year, *after the expenses of that department had been paid and charged upon its separate accounts.*

5. On the same page it is stated that securities representing the investment of *much of* plaintiff's capital assets were kept in separate packages, etc. What the Court found was that the capital stock and surplus funds were permanently invested, etc., and that *these investments* (not much of them) were kept in separate packages marked as stated.

6. At the bottom of page 6, it is stated, "In this account (Capital stock account) there was included plaintiff's capital, surplus, undivided profits, premium reserves, net profits, etc."

Finding IV is the only finding that states what was

included in the capital stock department. From that finding it appears that only the *capital stock* and the *surplus fund,* both represented by investments, were carried in the Capital Stock Department or account.

7. At page 7, it is stated that the expenses incident to the conduct of the banking business were paid out of the undivided profits in the same manner in which its other operating expenses were paid. While there may be some warrant for this statement in the Third Finding of the Court of Claims it is in flat contradiction of Findings VI and VII, where it is expressly found that (a) the business of the banking department was kept separate from the other business, etc., and that (b) the expenses were paid out of the earnings before they were carried to the undivided profits account.

8. At page 9 it is said:

> "* * * the fact that the plaintiff kept separate packages of securities in separate compartments of its vault and marked each package as heretofore indicated, would not determine, and is not proof that one bundle of securities represented capital any more than the other; * * *"

This statement is particularly misleading because it assumes that all the plaintiff did was to keep separate packages of securities, as stated, whereas the Court expressly found that the capital and surplus were permanently invested in these securities. In other words, appellant is not put to the necessity of relying upon an inference to be drawn from the mere keeping of certain packages of securities separte and apart that the capital and surplus were invested in these securities, but its claim to that effect is based upon the *posi-*

tive finding of the Court which the Government here is not at liberty to dispute.

The facts are utterly unlike those presented in *Anderson v. Farmers Loan & Trust Co., supra,* relied upon by the Government. There the Trust Company simply held investments to an amount exceeding the capital, etc., and the Court said:

> "We do not think that the possession of securities of a value exceeding the capital, surplus and undivided profits is proof that no part of the capital, surplus and undivided profits is used or employed in banking."

Here, however, the *fact* is established that from the beginning the capital and surplus were actually embodied in these investments.

9. The Government admits on page 24 of its brief "If the capital is prorated among the different branches of its business in accordance with the profits of that branch as compared with all the branches, taking the net assets as the basis of the capital the claimant would be dealt with justly and the spirit of the law would be carried out."

The Government further states "that this cannot be done in this case because the appellants have not furnished the evidence for making this computation."

This is an erroneous statement (see appellant's motion to remand, pp. 3, 22-24).

10. At page 30, in an attempt to distinguish the Treat case from the instant case, it is said that "in the instant case the lower court found that they (that is the capital and surplus) were employed in banking." Of course, as we have pointed out again and again, the lower Court made no such finding, but on the contrary,

found that they were permanently invested in real estate, bonds, etc., and all operations relating thereto were kept wholly separate and distinct from the operations of the banking department.

11. At page 35, attention is called to the fact that the Court in the Treat case said that "plaintiff is not a bank or banker but does some of the things enumerated in the section as indicative of such business." And attempting to distinguish the instant case, counsel says: "In the case at bar appellant is a banker handling millions in the banking business."

In the face of the findings of the Court below it is somewhat difficult to find an excuse for this statement. In the instant case appellant is primarily a surety company, as in the Treat case the plaintiff was primarily a trust company. The Government itself concedes that "the surety business was plaintiff's chief business." (Government's brief, page 5.) It was not a banker in the commercial sense of that term. *Mercantile National Bank of New York v. Mayor, etc., of N. Y.*, 121 U. S., 138, 159. It simply did some of the things (precisely the same things, no more and no less), that were done by the plaintiff in the Treat case which brought it within the definition of the Taxing Act.

III.

LIMITATIONS.

The Government contends that the action is barred by the Statute of Limitations. This defense has been repeatedly asserted by the Government in the Court of Claims and in this Court in actions for the refund of taxes under Refunding Acts.

In the instant case the Government demurred to the

original petition filed in the Court of Claims which demurrer was overruled without prejudice. 54th Court of Claims, page 43.

The Court of Claims there followed the decision of this Court in the Hvoslef case, 237 U. S., page 1, saying:

> "The same rule must obtain as to all claims described in the Act of 1912 *and in this view we are not concerned in the principal case with the questions arising under the general provisions of the Internal Revenue Laws.*"

The same question was later considered in the Sage case, 250 U. S., 33 (decided May 19, 1919), where the Court said: "The Act of 1912, like that of 1902 created rights where they had not existed before (*U. S. vs. Hvoslef*, 237 U. S., page 1) and the claimant's rights are not barred."

In the Sage case this Court said "The Act of ~~1921~~ 1912 applies in terms to all claims for the refunding of any Internal Tax alleged to have been erroneously or illegally assessed and collected * * * the only condition was it should have been presented not later than January 1, 1914. Until that time no Statute of Limitations could begin to run. * * * This suit was brought on January 23, 1917, and so was within the six years allowed by Rev. St. §1069 * * * for suits in the Court of Claims."

See also *Uterhart vs. United States*, 240 U. S., 598.

In the case of *Kahn, et al., Executors, vs. United States*, No. 52, October Term, 1921, reported in advance sheets of January 1, 1922, although the Court below held the action barred by the Statute of Limitations, the Court decided the case upon its merits.

The Court's attention is also called to the case of

Henry, Executor, vs. United States, 251 U. S., 393, which was dismissed by the Court of Claims as barred by the Statute of Limitations.

In this Court the Government admitted the judgment could not be sustained on that ground but it was affirmed on other grounds.

In the case of *Tiffany, Executor, vs. United States,* the action had been dismissed by the Court of Claims as barred by the Statute of Limitations.

In this Court the Government confessed error, 252 U. S., 590, 55th Court of Claims, 519 and 534.

On page 62 of its brief, the Government also contends that Chapter 140, Act approved March 4, 1915, 38 Stat., 996 bars this case, said Act providing "nor shall said Court of Claims have jurisdiction of any claim which is *now barred* by the provisions of any Law of the United States."

Inasmuch as the Statute of Limitations would not run against the claim until January 1, 1920, it is difficult to understand why counsel for the Government should cite this provision.

Respectfully submitted,

SIMON LYON,
R. B. H. LYON,
Attorneys for Appellant.

GEORGE SUTHERLAND,
Of Counsel.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

APPEAL FROM THE COURT OF CLAIMS.

[redacted]

MOTION TO REMAND TO THE COURT OF CLAIMS FOR FURTHER FINDING OF FACTS.

[redacted]

[redacted]

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[redacted]

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[redacted]

TABLE OF CONTENTS.

Citations.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 207.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

MOTION TO REMAND TO THE COURT OF CLAIMS FOR FURTHER FINDING OF FACTS.

The appellant, the Fidelity & Deposit Company, of Maryland, by its attorneys respectfully represents unto this honorable court:—

1. That this cause involves the construction and application of Act of Congress approved the 13th day of June, 1898 (30 Stats. 448), Section 2 of which imposed a tax upon capital used or employed by bankers. The above Act was repealed by the Act of April 12, 1902 to take effect July 1, 1902. (32 Stats. 96, 97.) The cause

also involves the construction of the Act of July 27, 1912, (30 Stats. 240), which act was entitled "An Act extending the Time for the Re-payment of Certain War Revenue Taxes erroneously collected."

II. The tax upon bankers was an excise tax the amount of which was determined by the amount of capital or surplus used or employed in their banking business. The undisputed evidence in the court below disclosed the fact that the limited banking business of the corporation made no use or employment of the company's capital or surplus. The record in the Court of Claims discloses the fact that the capital and surplus of the Fidelity & Deposit Company of Maryland was invested in securities and real estate which was used in the conduct of the bonding business which was the main purpose for which the company was organized. The record further discloses that the banking department of the company was relatively small in comparison with the bonding business and that the funds employed in the banking department were only the funds held on deposit and that no part of the appellant's capital or surplus was in any manner used or employed in the banking department. The banking department occupied a part of the building in which part of the capital of the company was invested, but the banking department paid the surety department rental therefor. The banking department showed a profit during the years in question arising solely from the use of the depositors' money after paying all expenses including rental for its banking space and without the use of any of the capital or surplus of the company.

III. The appellant requested the Court of Claims in its VI Request for Findings of Fact to find that no

part of its capital or surplus was used or employed in its banking business as will appear from Appellant's Requests for Findings of Fact attached hereto as Appellant's Exhibit "A." The Court of Claims, however, made no distinct finding as to whether or not the capital or surplus of the appellant company was used or employed in its banking business.

IV. The Court of Claims found in Finding V, page 21, of the transcript of the record filed in this Court the amount of the deposits in the banking department for each year in question, and the amount of the net income realized by the banking department for the years in question. In the Court's finding below, however, it omitted to find for the purpose of comparison of the surety department with the banking department the amount of net income derived from the surety department, although statements showing such net income of the surety or bonding department was contained in the record and undisputed, as will be seen from a statement of profits of that department attached hereto and marked Appellant's Exhibit "B."

The court below was also requested to find the net income of the surety department by the appellant's supplemental motion for a new trial, which motion was overruled. The motion for a new trial and supplemental motion are attached hereto and marked Appellant's Exhibit "C" and "D."

WHEREFORE, the appellant moves this Court to remand the cause to the Court of Claims with directions to find from the evidence now in its record:—

First:—Whether or not the banking department used only the funds of its depositors in the conduct of the business of that department.

Second:—Whether or not any of the capital or sur-

plus of the company was actually used or employed in the banking business, and, if so, what amount.

Third:—What was the net income of the appellant's surety or bonding department during each of the years in question.

SIMON LYON,
R. B. H. LYON,
Attorneys for Appellant.

GEORGE SUTHERLAND,
of Counsel.

BRIEF ON THE FOREGOING MOTION.

A motion of this character is a proper motion. United States vs. Adams, 9 Wallace, 661; Ripley vs. United States, 220 U. S. 491; United States vs. Archer, 241 U. S. 119; Maryland Casualty Company vs. United States, No. 73, October Term, 1919.

The facts upon which this motion are based are sufficiently set forth therein. It was the undisputed testimony in this case that the only funds that the banking department actually used or employed in its banking business were the funds of its depositors held on deposit and that no part of the capital or surplus of the company was used or employed in the banking department. The Court, however, has not so found and until such findings have been made or the negative thereof a proper decision cannot be reached in this case.

If, however, the Court should determine that a portion of the capital had been used or employed in the banking department there is no method of arriving at the amount so used or employed without additional findings. The net income or earnings of each department should be found for purposes of comparison. See, for example, Real Estate Title & Insurance Co. v. Lederer, 263 Fed. Rep., 667, 669. In the instant case, the Court found the net income of the banking department, but failed to find the net income of the surety department. We are, therefore, asking that for purposes of comparison of the two departments the net income of both be found. We do not, however, concede that this indicates that any of the capital or surplus of the company was used or employed in the banking department.

We respectfully submit that until the additional findings requested have been made that a proper judgment cannot be rendered in this case.

Respectfully submitted,

SIMON LYON,
R. B. H. LYON,
Attorneys for Appellant.

GEORGE SUTHERLAND,
Of Counsel.

AFFIDAVIT OF COUNSEL.

District of Columbia, ss:

Simon Lyon being duly sworn deposes and says that he is one of the attorneys for the appellant in the above entitled cause, No. 207, of the October term, 1921; that he is familiar with the record thereof in the Court of Claims and in this Court; that he helped to prepare and has read the foregoing motion; that he believes the facts therein set forth to be true; that in his opinion the facts set forth in the findings of the Court of Claims are insufficient for this Court to pass properly upon the claim in dispute; that the findings of fact are insufficient in not including therein

1. Whether or not the banking department used the funds of its depositors only, as the funds for the operation of that department.

2. Whether or not any of the capital or surplus of the company was used or employed in the banking business and, if so, what amount.

3. What was the net income of the appellant's surety or bonding department during each of the years in question? That without such findings this Court can not properly pass upon the issues submitted to it.

SIMON LYON.

Subscribed and sworn to before me this 14th day of December, 1921.

GEORGE W. SMITH,
Notary Public.

(Seal)

EXHIBIT "A,"

IN THE

UNITED STATES COURT OF CLAIMS.

No. 33,796.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
vs.
THE UNITED STATES.

PLAINTIFF'S REQUEST FOR FINDINGS OF FACT, STATEMENT AND BRIEF.

STATEMENT OF CASE.

This is a suit to recover $8,300 unlawfully collected from plaintiff by the Collector of Internal Revenue as special bankers' taxes during the period July 1, 1898-June 30, 1902, under Section 2 of the War Revenue Act of June 13, 1898 (30 Stat., 448).

Under this act a "special tax" at graduated rates was imposed upon "bankers using or employing a capital" of certain amounts, bankers being defined as those "having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, cheque or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange or promissory notes, or where stocks, bonds, bullion, bills of exchange or promissory notes are received for discount or sale."

Plaintiff is a corporation of the State of Maryland, having been incorporated in 1890 as a trust and deposit company under the name of "Fidelity Loan & Trust Company of Baltimore City." About a month later the name of the company was changed by special legislative act to "The Fidelity and Deposit Company of Maryland" and the company was thereupon authorized to conduct what is commonly known as a "general surety and bonding business." The company, under the powers thus conferred, operated several distinct departments, the principal business transacted being that conducted by its surety bond branch, known as the "Capital Stock Department." It also operated a "Banking Department" where money was received from depositors subject to repayment upon cheque, draft or order, and where money was advanced or loaned to customers on the security of stocks and bonds. The only classes of business enumerated in Section 2 of the Taxing Act which the Company transacted were those above mentioned, viz., the receipt of deposits and the making of loans on stocks and bonds and these were conducted exclusively by the Banking Department. Practically from the beginning, the Company has kept its surety bond, and related businesses, separate and distinct from its banking operations, not only as a bookkeeping and accounting proposition, but as a physical fact—in its documents, data, and details. At the time in question, the surety bond business of plaintiff had assumed large proportions, the premiums alone, on the bonds executed, amounting to about a million dollars a year. The earnings of this department were about twenty times as great as the earnings from the banking department. During the period in question, the average capital

stock outstanding was $1,500,000, the average surplus $1,812,500. The money derived from the sale of capital stock and the money of the surplus fund has always been kept separate from the money used by and in the banking department—the former being permanently invested in securities which were earmarked as belonging to the Capital Stock Department and kept separate from the earmarked securities of the banking department in which money of the latter department was invested.

The Banking Department maintained a separate organization. Both as a matter of bookkeeping and in its actual operations, the business of this department was kept separate and distinct from all other businesses conducted by the company. The company consistently treated itself as a trustee for depositors in its Banking Department and has scrupulously kept the money thus received on deposit entirely separate from its other moneys. The investments made by this department, all of its banking business in fact was conducted solely on the depositors' money.

Though none of the capital or surplus of plaintiff was used or employed in the banking business which plaintiff transacted, the Internal Revenue officers assessed and collected from plaintiff during the period in question the sum of $8,300 as a special banker's tax, computed at the prescribed rate upon plaintiff's capital stock. The tax assessed and collected for the fiscal year ending June 30, 1898, was based, however, upon merely a nominal capital of $25,000.

Under the authority of the refunding act of 1912, a claim for refund was duly filed by plaintiff on the prescribed Treasury form No. 46, on November 22, 1913. The claim was rejected on April 19, 1917.

REQUEST FOR FINDINGS OF FACT.

The plaintiff, considering the facts as hereinafter set forth to be proven and deeming them material to the due presentation of this case, requests the court to find the same as follows:

I.

The Fidelity and Deposit Company of Maryland is a corporation duly organized and existing under and by virtue of the laws of the State of Maryland with its principal offices in Baltimore, Maryland. It was incorporated in February, 1890, under article 23 of the Code of Public Laws of Maryland, its charter being amended at different times thereafter by special acts of the legislature of that State. True copies of the general laws, charter, and special acts referred to are incorporated in plaintiff's petition, a copy of which is attached to and made a part of these findings.

II.

Plaintiff, as its name indicates, is and was at the times involved in these transactions a bonding and surety company, its principal business being that of acting as surety for the fidelity and faithful performance of persons holding places of trust or responsibility, public or private, or bound by any duty or contract. Plaintiff also executed bail bonds and recognizances and acted as trustee under deeds of trust for mortgage bond issues (Q. 4, 30; Q. 29, R. 32; Qs. 74-79, R. 37; Qs. 106-117, R. 40; Qs. 151-156, R. 44).

Continually since its organization plaintiff has maintained a separate and distinct department and organi-

zation for the transaction of that part of its business just above described (Qs. 39-40, 44-47, R. 33; Q. 53, R. 34).

III.

The capital stock and surplus accounts of plaintiff company during the period in question were as follows:

	Capital	*Surplus.*
For the year ending:		
June 30, 1898	$1,000,000	$1,000,000
1899	1,500,000	1,850,000
1900	1,500,000	1,850,000
1901	2,000,000	2,550,000

(Qs. 5-10, R. 30; Qs. 17-24, R. 31.)

IV.

The money derived from the sale of capital stock and the money of the surplus fund were never commingled with the total assets of the company, but were permanently invested in real estate, bonds, stocks and some few other securities and employed solely in conducting its surety and bonding business, which was called by plaintiff and designated on its books as the "Capital Stock Department." The investments of the assets of this department, the capital stock money and surplus, were designated "Capital Stock Investments" and all the operations of the department were recorded in distinct and separate accounts on the books of the company, known as the "Capital Stock Account," and kept separate and distinct from the records of all other business transacted by the Company. The investments of the Capital Stock Department were kept alone in a separate compartment in the company's vault, in envelopes earmarked "C-S" (Qs. 30-55, R.

32; Qs. 74-79, R. 37; Qs. 104-117, R. 40; Qs. 143-147, R. 44; Qs. 151-156, R. 44) (Qs. 14-23, R. 57; Qs. 30-32, R. 58; Qs. 50-55, R. 60; Qs. 62-73, R. 61; Qs. 86-88, R. 62).

The income of the Capital Stock Department consisted principally and almost exclusively of premiums earned on bonds executed by the company which, during the period in question, were as follows:

For the year ending:	
Dec. 31, 1897	$645,908.67
1898	858,975.71
1899	976,894.47
1900	1,135,321.65
1901	1,211,588.61

(Qs. 192-202, R. 48.)

V.

The plaintiff also maintained and operated another separate and distinct department and organization which conducted the so-called banking business of the company. This department occupied branch offices of the company. For further security, the company received money on deposit from those whom it insured or bonded and these funds were deposited with the banking department. Credits were also opened by the deposit of money or currency subject to be remitted or paid upon draft, check or order, and the banking department advanced or loaned money to its customers on notes secured or supported by stocks and bonds, but not by bullion, bills of exchange or promissory notes. It did not receive either for discount or sale any stocks, bonds, bullion, bills of exchange or promissory notes and in fact did not deal at all in commercial paper. The money received on deposit as aforesaid, during the period in question was as follows:

For the year ending:	
June 30, 1898	$2,632,625.66
1899	3,173,017.39
1900	3,739,275.47
1901	4,139,675.55

The following sums derived from the investment of these deposits were returned to the depositors as interest:

For the year ending:	
Dec. 31, 1898	$49,291.88
1899	76,255.11
1900	84,191.18
1901	86,788.78

leaving a net income derived from this business as follows:

For the year ending:	
Dec. 31, 1898	$43,607.64
1899	60,325.23
1900	78,275.29
1901	92,852.56

This department also maintained safe deposit vaults for customers and derived a relatively insignificant income from the rental of its safe deposit boxes. These rentals in 1898 amounted to $3,928.50. (Qs. 55-80, R. 35; Qs. 94-129, R. 39; Qs. 180-184, R. 47; Qs. 193-199, R. 49; Qs. 25-32, R. 58; Qs. 41-55, R. 59; Qs. 63-68, R. 61).

VI.

The business of the banking department was kept entirely separate and distinct and segregated from all other business conducted by plaintiff. The money received from deposits was invested in stocks and bonds

which were kept in separate envelopes in separate compartments of the company's vaults and earmarked "I.D." or "E.D.," respectively, according as they represented general individual deposits or deposits called "Estate Deposits" made by those bonded or insured by the company. The assets of the banking department were not employed in the transaction of any of the businesses conducted by the Capital Stock Department, and the records of the business of the banking department were kept in separate books as accounts separate and distinct from the accounts of the Capital Stock Department. The entire business of the banking department was conducted solely on its depositors' money. Neither the capital stock nor surplus of plaintiff company was used or employed by or in the banking department. (See citations under V, above.)

VII.

Earnings from the two separate departments were carried to the undivided profits account of the company at the end of each year, after the expenses of each department had been paid and charged to the appropriate department upon the separate accounts of that department out of the earnings of that department. A part of the income from each department was maintained as cash and remained uninvested, part of the money being carried by the respective departments as counter cash and the balance being deposited in the company's various depositaries. The money so deposited was not segregated according to the source from which it came, though the source of the items comprising its total amount was recorded in the respective books of each department (Qs. 185-188, R. 48; Qs. 213, 268, R. 51; Qs. 55-61, R. 60).

VIII.

In each of the years in question plaintiff was required by and thereupon regularly and duly made to the Commissioner of Internal Revenue a return of its capital and surplus upon which defendants' duly authorized revenue officers assessed against and collected from plaintiff the total sum of $8,300 as special bankers' taxes under Section 2 of the Act of June 13, 1898, as follows:

For the fiscal year ending June 30, 1898, twenty-five thousand dollars ($25,000) at two dollars per thousand	$50.00
For the year ending June 30, 1899, one million one hundred twenty-five thousand dollars ($1,125,000)	2,250.00
For the year ending June 30, 1900, one million five hundred thousand dollars ($1,500,000)	3,000.00
For the year ending June 30, 1901, one million five hundred thousand dollars ($1,500,000)	3,000.00
Total tax on capital	$8,300.00

The sums so collected were duly and regularly reported by said officers and covered into the Treasury of the United States.

IX.

Under authority of the Act of July 27, 1912 (37 Stat., 240), plaintiff on November 22, 1913, filed its application in the Treasury Department praying the refund of said sum of $8,300 through the Collector of Internal Revenue, located in the city of Baltimore, Md., who, in the regular course of his official business, certified the same to the Treasury Department for its con-

sideration. Its application was on the prescribed Internal Revenue form known as Form 46, revised November, 1907, and was in all respects complete, regular and in accordance with the law and regulations and supported by the evidence and powers required. It alleged as ground for refund that the taxes in question were assessed and collected on plaintiff's capital and surplus, which were not used or employed in the banking business within the meaning of Section 2 of said War Revenue Act. Notwithstanding the said application for refund was rejected by the Secretary of the Treasury on April 16, 1917, and the Department has never refunded and still refuses to refund to plaintiff the sums claimed as aforesaid (R. 63-70).

BRIEF.

I.

The measure of the Special Bankers' Tax is the amount of capital "used or employed" in the business of banking.

This proposition is submitted upon the arguments and authorities set forth in support of the first proposition of plaintiff's brief which we filed in this court on January 30, 1920, in the case of Union Trust Company of Indianapolis vs. United States, No. 33,978.

II.

Neither the plaintiff's capital nor surplus was appropriated to, used or employed, in the banking business during the taxing periods in question.

Although this proposition is stated in terms identical with those of the second proposition in our above-

mentioned brief, it is advisable briefly to point out the distinguishing features presented by the evidence disclosed in the present record.

The questions of law raised by the foregoing propositions have been presented to the courts for adjudication under varying circumstances. The Farmers Loan & Trust Company of New York so conducted its great trust business and its much smaller banking business that it was impossible to show such a physical segregation of the company's assets that the capital stock money could be actually pointed to as such. But as the company continuously kept invested in permanent investments assets of a value exceeding the amount of its outstanding capital stock it was found, as an ultimate fact, that the capital was not "used or employed" in the banking business (Treat vs. Farmers Loan & Trust Co., 185 Fed., 760). This company was again before the court seeking to recover the special bankers' taxes collected from it under the Act of 1914. But, as Judge Hand pointed out, its banking powers and the varieties of banking business transacted had now greatly increased. In view of the facts disclosed, the court would not assume, until resort to positive proof had failed, that any specific assets of the company constituted capital. It thought that it was incumbent upon the trust company to show what proportion of its total *assets* was used or employed in transacting that part of its business defined as banking in the Act, and thereby show what proportion of the *capital* was thus used or employed. Consequently the case was remanded that the proof might be furnished (Anderson vs. Farmers Loan & Trust Co., 241 Fed., 322).

Then the Real Estate Title & Trust Co. of Philadel-

phia and Title Guarantee & Trust Co. of Baltimore came before the courts. These companies transacted some banking business, but both in volume and importance it was relatively insignificant as compared with the principal trust and title insurance business transacted. But the banking business was *segregated* from the other businesses and none of the capital or surplus was used or employed in banking. In view of the decisions in New York and from the logic of the facts presented it followed *a fortiori* that recovery of the taxes should be permitted under such circumstances. And so Judge Rose held in the Baltimore case (Title Guarantee & Trust Co. vs. Miles, 258 Fed., 771). But Judge Dickinson, in Philadelphia, by a peculiar process of reasoning held as a matter of law that considering capital as a banking expression and not as an economic substance, it could not be ear-marked as such. In our brief in the Indianapolis case, No. 33,978, we attempted to show the fallacy underlying Judge Dickinson's argument, and our judgment has now been sustained by the Circuit Court of Appeals for the Third Circuit which recently reversed Judge Dickinson in the same case on appeal (Real Estate Title & Trust Co. vs. Lederer, — Fed., —).

Now the Real Estate Title & Trust Co., like the plaintiff here, was principally engaged in transacting business other than that of banking. Both companies maintained a complete segregation of assets, both as a physical fact and as a matter of bookkeeping. Neither company used or employed its capital in the business of banking. The facts of that case are practically identical with those of the instant case, though it is apparent that the relative importance of the banking business done by this plaintiff as compared with its other

businesses is much less than the relative importance of the banking business done by the Real Estate Title & Trust Company.

The record in this case shows such a complete segregation of assets, both as a physical fact and as a matter of bookkeeping, that we do not presume to take the time of the court by making an analysis of the evidence. Our requests for findings of fact, and the citations to the record in support thereof, plainly and sufficiently show, without further elucidation, that neither the capital nor surplus of this company was ever used or employed in the business of banking. This fact was so plainly apparent that it was acknowledged even by the Collector of Internal Revenue in 1898, who that year only taxed plaintiff on an assessment which assumed a nominal capital of $25,000.

Under such circumstances as these must the plaintiff be subjected to the injustice that follows upon payment of a tax on capital that was never used in the banking business, but only in the vast bonding, surety and related businesses conducted by this surety company? The taxing act would be reduced to an absurdity were a construction adopted under which plaintiff company while paying a tax under Schedule "A" on every surety bond it executed was, for the purposes of Section 2, classified as a banker using its entire capital and surplus in the business of banking. The results we seek to avoid are very clearly indicated by Chief Justice Buffington in the Philadelphia case:

> "As we have said, the plaintiff, Trust Company, by virtue of corporate powers thereto enabling it, is, besides banking, engaged in four other distinct businesses, first, insuring titles; second, executing trusts; third, safe deposit, and fourth,

real etate; and in carrying such title, trust, safe deposit and real estate businesses, the plaintiff does none of the several acts which the statute defines as constituting banking; that is to say, it does not receive deposits, make collections, loan money or discount or sell notes. From which it will appear that if the plaintiff company were only carrying on, first, its title insurance business; second, its trust business; third, its safe deposit, and, fourth, its real estate business, it would not be subject to tax under this Act as being engaged in the banking business. Such being the undoubted fact, does the further fact that plaintiff adds a fifth business, viz., that of banking, to its corporate acts, thereby subject to the taxing scope of this Act not only $1 for each $1,000 of capital used or employed in its banking business, but also for each $1,000 capital employed (first) in its title business, (second) in its trust business, (third) in its safe deposit, and (fourth) in its real estate business. We think the statement of such proposition is of itself an answer to the contention."

Respectfully submitted,

LYON & LYON,
Attorneys for Plaintiff.

SETH SHEPARD,
H. ROZIER DULANY, JR.,
Of Counsel.

EXHIBIT "B."

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

1897—December 31st.

SURETY DEPARTMENT.

RECEIPTS.

Cash received for premiums on Bonds (see Item 6, page 70, of the Record)	$783,365.24	
Interest and Dividends on Stocks and Bonds (see Item 9, page 70, of the Record)	53,591.66	
Rents of Offices in Building (see Item 11, page 70, of the Record)	39,266.65	
Total Income for Year		$876,223.55

DISBURSEMENTS.

Total Disbursements (see page 71 of the Record)	$642,364.21	
Deduct Dividends paid to Stockholders (see Item 4, page 71 of the Record)	80,000.00	
Total Expenses	$562,364.21	
Net Profit of Surety Department for Year	313,859.34	
		$876,223.55

1898—June 30th.

SURETY DEPARTMENT.

RECEIPTS.

Cash received from Premiums on Bonds (see Item 6, page 76, of the Record)	$439,649.18	
Interest and Dividends on Stocks and Bonds (see page 76 of the Record)	31,319.63	
Rents of Offices in Building (interest upon other debts due the Company) (see page 76 of the Record)	19,142.52	
Total Income for Period, January 1, 1898, to June 30, 1898		$490,111.33

DISBURSEMENTS.

Total Disbursements (see page 77 of the Record)	$468,196.92	
Deduct Dividends paid to Stockholders (see page 77 of the Record)	50,000.00	
Total Expenses	$418,196.92	
Net Profit of Surety Department for Period January 1, 1898, to June 30, 1898	71,914.41	
		$490,111.33

1899—December 31st.

SURETY DEPARTMENT.

RECEIPTS.

Cash Received from Premiums on Bonds (see Item 6, page 81, of the Record)	$947,542.38	
Interest and Dividends on Stocks and Bonds (see item 10, page 81, of the Record)	91,517.53	
Rents of Offices in Building (see tem 7, page 81, of the Record)	38,138.69	
Total Income for Year		$1,077,198.60

DISBURSEMENTS.

Total Disbursements (see page 82, of the Record)	$960,331.65	
Deduct Dividends paid to Stockholders (see Item 4, page 82, of the Record)	207,486.00	
Total Expenses	$752,845.65	
Net Profit of Surety Department for Year	$324,352.95	
		$1,077,198.60

1900—December 31st.

SURETY DEPARTMENT.

RECEIPTS.

Cash Received for Premiums on Bonds (see page 88, of the Record)	$1,138,262.47	
Rents from Company's Building (see page 88, of the Record)	38,453.32	
Interest and Dividends on Stocks and Bonds (see page 88, of the Record)	135,671.43	
Total Income for the Year		$1,312,387.22

DISBURSEMENTS.

Total Disbursements (see page 89 of the Record)	$1,222,514.29	
Deduct Dividends paid to Stockholders (see page 88, of the Record)	262,447.50	
Total Expenses	$960,066.79	
Net Profit of Surety Department for Year	352,320.43	
		$1,312,387.22

1901—December 31st.

SURETY DEPARTMENT.

Receipts.

Cash received for premiums on bonds (see page 96, of the Record)	$1,206,058.81	
Rents from Company's Building (see page 96, of the Record)	38,035.89	
Interest and Dividends on Investments, Stocks and Bonds (see page 96, of the Record)	145,363.43	
Total Income for the Year		$1,389,458.13

Disbursements.

Total Disbursements (see page 97, of the Record)	$1,343,841.29	
Deduct Dividends paid to Stockholders (see page 97 of the Record)	244,963.25	
Total Expenses	$1,098,878.04	
Net Profit of Surety Department for Year	290,580.09	
		$1,389,458.13

1902—December 31st.

SURETY DEPARTMENT.

Receipts.

Cash received from premiums on Bonds (see page 102, of the Record)	$1,227,994.24	
Rents from Company's Building (see page 102, of the Record)	43,296.28	
Interest on Stocks and Bonds (see page 102, of the Record)	175,845.90	
Total Income for the Year		$1,447,136.42

Disbursements.

Total Disbursements (see page 103, of the Record)	$1,463,900.58	
Deduct Dividends paid to Stockholders (see page 102, of the Record)	279,993.00	
Total Expenses	$1,183,907.58	
Net Profit of Surety Department for Year	263,228.84	
		$1,447,136.42

EXHIBIT "C."

FILED AUGUST 6, 1920.

COURT OF CLAIMS OF THE UNITED STATES.

No. 33,976.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

vs.

THE UNITED STATES.

MOTION FOR A NEW TRIAL.

Now comes the Plaintiff, the Fidelity & Deposit Company of Maryland, by its attorneys, Lyon & Lyon, Esqs., and prays this Honorable Court to grant it a new trial from the judgment and order of dismissal made by the court herein, for the reason that errors in fact and errors in law were committed by this Honorable Court in arriving at its findings of fact and conclusions of law, filed in the above entitled case on the 7th day of June, 1920.

LYON & LYON,
Attorneys for Plaintiff.

SETH SHEPARD,
Counsel.

That specific errors in fact and errors in law will be set out in detail in Plaintiff's brief to be hereafter filed in support of this Motion for a New Trial.

LYON & LYON,
Attorneys for Plaintiff.

EXHIBIT "D."

FILED SEPTEMBER 24, 1920.

COURT OF CLAIMS OF THE UNITED STATES.

No. 33,976.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

vs.

THE UNITED STATES.

SUPPLEMENT MOTION FOR NEW TRIAL.

Now comes the plaintiff, the Fidelity & Deposit Company of Maryland, by its attorneys, and files this supplement to its motion for new trial filed herein on the 6th day of August, 1920. When the said motion for new trial was filed the specific errors of fact and law complained against were not set forth, nor were specific amendments to the court's findings of fact requested. Plaintiff had been informed by the court and by the clerk of the court that no findings of fact had been filed in this case and hence plaintiff duly filed its request that the court make findings of fact and file the same herein. This request was taken under consideration by the court and on the last day on which under the rules the plaintiff was permitted to file motion for a new trial, the court informed the plaintiff that findings of fact had already been filed by the court in this case. Thereupon, the plaintiff immediately filed its motion for a new trial, but because of the shortness of time it was impossible to set forth specific errors, make specific requests and support the same with the reasons therefor. It is, therefore, requested that said motion for new trial be considered by the court in conjunction with the present supplement thereto.

Plaintiff, therefore, makes the following request for amendment of the findings of fact heretofore filed by the court in this case.

III.

Strike out the last sentence of the 2d paragraph which reads as follows:

> "Some portion of this building was used or employed by the plaintiff in its banking business, but what proportion so used as compared with the other portions of the building used in other branches of the company's business does not appear from the evidence."

Substitute therefor the following:

> A portion of this building was used or employed by the plaintiff in its banking business, but the building was carried as an asset of the Capital Stock Department, to which department the Banking Department paid rent for the building space used by the Banking Department in its operations.

REASON.

The portion of this finding above objected to conveys a false impression that would materially affect any conclusion of law drawn therefrom. The books of the company, introduced in evidence, disclose the rental value of the building space occupied by the banking department. The building, as shown by the evidence, was an asset of the Capital Stock, *i. e.*, the Surety Bond, department. The banking department paid an annual rental to the Surety Bond department for the former's use of a portion of the building. This

item was regularly charged against and paid by the banking department as banking department expense. (R. 55, Re-X-Q. 258-262; R. 51, Re-X-Q. 220; R. 33, Q. 44-46, 41.)

The items were not read into their depositions by the witnesses, as the amount of space used and the specific sums paid are quite immaterial to the issues presented in this case. The material fact is the one proved,—viz., that the segregation between departments was as complete in respect to building space as in respect to investments, receipts, expenditures, etc. The portion of the Finding objected to conveys the opposite impression.

III.

Strike out the last paragraph of Finding III. This paragraph relates to the expenses incident to the conduct of the banking business and holds that the same were paid out of the same fund of account; that all similar expenses were paid by plaintiff in the conduct of all its business; that this fund was the undivided profits account, and that the proportion of banking expense to all other expenses does not appear.

REASON.

The paragraph objected to is not supported by any evidence. Furthermore it directly contradicts the court's Finding No. VII which correctly states the facts as proved by the evidence.

The expenses of the banking department were not paid out of the undivided profits accounts, nor for that matter were the expenses of the Surety Bond department paid out of that account. The actual moneys with which the expenses of each department were paid, were the liquid moneys of the company, carried partly

as the counter cash of each department. The banking department paid its own expenses, wages, salaries, interests to depositors, rent for office space, etc., out of its own receipts, and how much these were and what proportion they bore to the other expenses of the company was definitely proved and appears on the books placed in evidence.

At the end of each fiscal period the difference between the receipts of each department and the expenses of each department were entered in a lump sum as the net earnings of the respective departments, in the undivided profits account of the company. Out of the credit balance of this undivided profits account, dividends were paid at the end of the fiscal periods on the entire capital stock of the company irrespective of how much of the credit balance was earned by this or that department. In other words, the segregation of business was strictly maintained up to the point where such segregation was useful and served some purpose, *i. e.* up to the point where each department completed its function as a department and turned over the money it made to the general purposes of the whole business. As a result of this segregation, the directors knew at every moment of time just how much money each department was earning, how much it was costing to operate, what its credit balances were, etc., etc. (R. 48, Qs. 185-188; R. 51, Qs. 213-268, R. 60, Qs. 55-61.)

The paragraph in question and Finding VII can't both be right. And there is positively no evidence in the record to support the facts found in the paragraph objected to.

IV.

At the end of Finding IV add the following:

The income of the Capital Stock Department con-

sisted principally and almost exclusively of premiums earned on bonds executed by the company which, during the period in question, were as follows:

For the year ending:	
Dec. 31, 1897	$645,908.67
1898	858,975.71
1899	976,894.47
1900	1,135,321.65
1901	1,211,588.61

(Qs. 192-202, R. 48.)

REASON.

Without the disclosure of the above facts the Findings as a whole furnish no basis for a comparison of the business done by this department with that done by the banking department. The volume of business done by the banking department is quite clearly indicated by Finding V and for all that the Findings disclose this might be the principal business done by plaintiffs. It is material to the issues to show that the banking business was relatively insignificant as compared with the Surety Bond business, plaintiff's principal business.

VII.

At the end of the first paragraph of Finding VII add the following:

> The segregated assets of any department were not used or employed by any other department in the conduct of the business of that other department. The income derived from the investment or use of the segregated assets of any department was not used or employed by any other department.

REASON.

It is submitted that since the Court has already found that the assets of each department were segregated it should carry such a finding to its logical conclusion and show whether or not the earnings from the investment of such assets were segregated also. The question at issue is whether or not the capital of the company was used or employed in the banking business, and this question cannot be determined until the court finds as a fact how the assets of the company were utilized. That the assets of the company were segregated is merely a preliminary conclusion of fact and the ultimate conclusion remains undetermined until the Court states what was done with those assets, after the segregation was made. The evidence indisputably shows that the segregation was carried through into the use made of those separate assets;—that the income derived from the use and employment of each kind of assets went to the credit of and was used and employed by the department which had exclusive control of the respective assets. (R. 35, Qs. 55-80; R. 39, Qs. 94-129; R. 47, Qs. 180-184; R. 49, Qs. 25-32; R. 59, Qs. 41-59.)

Respectfully submitted,

LYON & LYON,

Attorneys for Plaintiff.

AFFIDAVIT OF COUNSEL.

District of Columbia, ss:

Personally appeared before me, a Notary Public, in and for the aforesaid District of Columbia, Simon Lyon, who being duly sworn according to law states:

That he is a member of the firm of Lyon & Lyon, Attorneys in the Court of Claims for the Appellant herein, and assisted in preparing the pleadings therein, and he is familiar with the evidence taken in said cause.

That Exhibits "A," "C" and "D" are true copies of records filed in the Court of Claims and that Exhibit "B" is made from the record filed in the Court of Claims, specific reference being made to the pages of the record therein, Exhibit "B" being a true copy thereof.

That claimants motion for new trial was filed in the Court of Claims within the time prescribed by the rules of said Court and the supplemental motion was filed September 24, 1920, wherein reasons were given for the proper and further findings of said Court, reference being made to Exhibits "C" and "D" herein filed, and which motion was overruled on the 10th day of January, 1921, by the said Court of Claims.

SIMON LYON.

Subscribed and sworn to before me this 14th day of December, 1921.

GEORGE W. SMITH,
Notary Public.

(Seal)

FIDELITY & DEPOSIT COMPANY OF MARYLAND *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 207. Argued April 21, 1922.—Decided May 29, 1922.

1. In fixing special bankers' taxes under the Act of June 13, 1898, c. 448, § 2, 30 Stat. 448, the assessment is not confined to that part of a banker's capital which is used in making loans or directly in other banking transactions, but includes capital held or deposited as a reserve or invested in securities and which serves to give credit to the banking business; and even where such securities have been designated as assets of another kind of business and physically segregated as such, they still may represent capital employed in the banking business if they continue to give it credit. P. 301.
2. But where a corporation is lawfully engaged in several distinct lines of business, including banking, for each of which its capital supplies necessary credit, the whole of the common capital cannot be deemed capital of a single department; there should be an apportionment, and the extent to which the capital is used in banking is a question of fact. P. 301.
3. In an action to recover taxes collected under this act, where the plaintiff corporation claimed that the business of its banking department was conducted without the use of its capital but solely on its depositors' money, and the Court of Claims, though requested, made no specific finding on that subject but other findings respecting the segregation of the plaintiff's several kinds of business, investments, accounting, etc., from which the extent, if any, to which the capital was used in banking could not be definitely ascertained, *held* that the case should be remanded for further findings. P. 303.

4. The limitation on actions in the Court of Claims on claims arising under the Refunding Act of July 27, 1912, is six years. P. 303. *Sage* v. *United States*, 250 U. S. 33.

55 Ct. Clms. 535, remanded for further findings, etc.

APPEAL from a judgment of the Court of Claims dismissing a petition for recovery of money paid as bankers' special taxes under the Spanish War Revenue Act of June 13, 1898.

Mr. George Sutherland, with whom *Mr. Simon Lyon* and *Mr. R. B. H. Lyon* were on the briefs, for appellant.

Mr. Assistant Attorney General Lovett, with whom *Mr. Solicitor General Beck*, *Mr. Carl A. Mapes* and *Mr. B. H. Littleton* were on the briefs, for the United States.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

This suit was brought in the Court of Claims by the Fidelity and Deposit Company of Maryland to recover the sum of $8,300, being the aggregate of amounts paid as bankers' special taxes for the years 1898 to 1901, under § 2 of the Spanish War Revenue Act of June 13, 1898, c. 448, 30 Stat. 448. The company applied on November 22, 1913, for a refund, pursuant to the Act of July 27, 1912, c. 256, 37 Stat. 240, alleging that the taxes had been assessed and collected on plaintiff's capital, but that in fact none of it had been used or employed in the banking business. The application was rejected by the Secretary of the Treasury on April 19, 1917; and this suit was begun on July 25, 1918. The Government insisted that the taxes were legally payable and also that the claim was barred by the two-year statute of limitations. The court dismissed the petition without opinion on authority of *Union Trust Co.* v. *United States*, 55 Ct. Clms. 424; and the case is here on appeal. A motion to remand for further findings of fact made here by appellant earlier in this term was denied without prejudice.

By the Act of 1898 "bankers using or employing a capital not exceeding the sum of twenty-five thousand dollars" were required to pay a special tax of $50; and for every additional $1,000 the further amount of $2. The act provided, among other things, that "in estimating capital surplus shall be included"; and that "every person, firm, or company, and every incorporated or other bank, having a place of business where credits are opened by the deposit or collection of money or currency" subject to check, are to be deemed bankers. The Fidelity Company was unquestionably a banker; but banking was only one of four departments of its business. The others were: (a) the surety business—that is, acting as surety upon bonds conditioned for the faithful performance of duties by principals; (b) the safe-deposit business—that is, renting safe-deposit boxes for the safe keeping of valuables; (c) the business of acting as trustee under bond issues of other corporations. Whether the company had used or employed its capital in the banking business, within the meaning of the Act of 1898, is the main question presented.

The tax paid upon capital used or employed in banking was assessed for the year 1898 upon $25,000; for 1899 upon $1,125,000, and for 1900 and 1901 upon $1,500,000. The company claimed that it had not used any of its capital in banking during any of those years; and duly requested the lower court to find as facts that: "The entire business of the banking department was conducted solely on its depositors' money. Neither the capital stock nor surplus of plaintiff company was used or employed by or in the banking department." The court made no specific finding on that subject; and it overruled the motion for a new trial, in the supplement to which the company renewed its application for such findings, and also requested other specific findings in support of them. In the motion made here to remand the case for further find-

ings of fact the company requested that the Court of Claims be directed to find from the evidence: (1) Whether or not the banking department used only the funds of its depositors in the conduct of the business of that department; (2) whether or not any of the capital or surplus of the company was actually used or employed in the banking business, and, if so, what amount; and (3) what was the net income of appellant's surety or bonding department during each of the years in question. The court had already found the annual net income of the banking department; and it was asserted that in volume and profits the surety business was far more important than that of banking. If specific findings on these subjects are necessary to a proper determination of the case, it should clearly be remanded for that purpose; since the requests therefor were made seasonably in the lower court and here.

The Government contends that the findings requested are immaterial, because, as a matter of law, all of the capital (and surplus) was used or employed in banking. It argues that the words used and employed are not to be given the same meaning; that all the company's capital was, as matter of law, employed in the banking business, because all of it was, as matter of law, available for use in the banking department; and that all of it must in fact have enhanced the credit of the banking department, even if none of it was actually used in banking and the income of the banking department was derived directly from the investment of its deposits. In other words, the contention is that the act fixes the tax upon the banker "using or employing" a capital; and that a firm, or company, being a banker, can not escape, or reduce, the tax by showing that it is engaged in several lines of business and that, in fact, none, or only a part, of its capital was used specifically in its banking operations.

The findings of fact made by the Court of Claims were these: The company's capital stock and the surplus were

each $1,000,000 in 1898. Both were increased from time to time. In 1901 the former was $2,000,000, the latter $2,550,000. All the money derived from the sale of the capital stock and all the money of the surplus were permanently invested in real estate (including the office building at Baltimore in which the company's business was done) and in bonds, stocks and other securities. These investments were referred to and were designated on its books as "Capital Stock Investments." The securities and valuable papers representing them were segregated in a separate compartment of the company's vault in separate envelopes earmarked as capital stock. The financial operations concerning them were kept in a separate set of books distinct from the records of all other business transacted by the company. The business of the banking department was likewise kept separate, physically and as a matter of accounting, from all other business of the company. And the record of its operations was kept in a distinct set of books. The money received from deposits (which in 1901 exceeded $4,000,000) was invested in stocks and bonds which were kept in the vault in separate envelopes earmarked as such. The expenses of each department of the company's business were charged to the separate account of that department payable out of its earning. But physically expenses of the several departments may have been paid from a common fund. A part of the income from each department was maintained as cash and remained uninvested, part of the money being carried by the respective departments as counter cash and the balance being deposited in the company's various depositaries. The money so deposited was not segregated according to the source from which it came, though the source of the items comprising its total amount was recorded in the respective books of each department. The earnings of each department were carried to the undivided profits account of the company at the end of each year.

A portion of the office building was occupied by the banking department.

We cannot, on these findings of fact, say, as matter of law, that all the capital of the Fidelity Company was used in the banking business; nor can we say that at least the amount upon which the tax was assessed (which in no year was as much as one-half the company's capital) was so used. Capital may be employed in banking although it is not used strictly as working capital and none of it is used in making loans or directly in other banking transactions. Money of a banker held in the vault or with depositaries as a reserve is employed in banking as much as money loaned to customers. Capital invested in securities may be employed in banking even if its sole use is to give to the banker the credit which attracts depositors or to make it possible for him otherwise to raise money with which banking operations are conducted. And if such securities serve to give credit, they will continue, also in the legal sense, to be capital used in the banking business, even if they are designated by the company as assets of another department and physically segregated as such. Compare *Canal & Banking Co.* v. *New Orleans,* 99 U. S. 97. If a company is engaged exclusively in banking, all of its capital, however invested, may reasonably be held to be capital employed in banking without enquiry into the particular use to which it is put. Compare *Leather Manufacturers' National Bank* v. *Treat,* 116 Fed. 774; 128 Fed. 262. But where a company is lawfully engaged in several distinct businesses to the successful conduct of each of which credit is necessary, and the company's capital supplies such credit to each, the whole of this common capital cannot be deemed capital of a single department. Under such circumstances charges incident to common capital are, in accounting practice, apportioned ordinarily among the several departments; and it may not be assumed that Congress in laying this tax intended to depart from the usage of business.

With the apportionment of charges incident to capital used in common by several departments or branches of a business, both courts and legislatures have become familiar. Such apportionment is made when the tangible property of a corporation is scattered through different States and its intangible property is treated, for purposes of taxation, as distributed among the several States in which the tangible property is located. *Adams Express Co.* v. *Ohio*, 165 U. S. 194; 166 U. S. 185; *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450; *Wells, Fargo & Co.* v. *Nevada*, 248 U. S. 165. Statutes are common by which foreign corporations are taxed upon the amount of their capital employed within the taxing State. Would it be contended that all the capital of the foreign corporation was taxable in each such State, because all of its capital is conceivably available for use in each and all is liable for debts incurred in each? The Act of 1898 applies to individual bankers as well as to corporations. Surely Congress could not have intended to tax as capital employed in banking the whole net property of an individual banker. Yet the possession of large wealth would probably aid him in attracting depositors; and all his property would, if required, be available legally, and possibly in fact, to meet requirements of his banking business. That apportionment of the capital of a company among its several departments can and should be made for purposes of taxation has been held by lower courts in cases arising under § 3 of the Act of Congress October 22, 1914, c. 331, 38 Stat. 745, 750, which is substantially the same as the provision here in question.[1] They recognize that

[1] *Anderson* v. *Farmers' Loan & Trust Co.*, 241 Fed. 322; *Title Guarantee & Trust Co.* v. *Miles*, 258 Fed. 771; *Real Estate Title Insurance & Trust Co.* v. *Lederer*, 263 Fed. 667. Compare *Central Trust Co.* v. *Treat*, 171 Fed. 301; *Treat* v. *Farmers' Loan & Trust Co.*, 185 Fed. 760; *Fidelity Trust Co.* v. *Miles*, 258 Fed. 770; *Germantown Trust Co.* v. *Lederer*, 263 Fed. 672.

the question whether the capital was used in the banking business, and if so to what extent, is a question of fact.

On the facts found by the Court of Claims we are unable to say that no part of the capital was used in the banking business or that there was used at least as much thereof as was represented by the taxes assessed. It follows that in order to determine what sums, if any, are recoverable, additional facts must be found. The request for further findings made by appellant was appropriate; and the case should be remanded with directions to make such findings; unless, as the Government contends, the claim sued on is barred by the two-year statute of limitations.

The contention is that the cause of action accrued on May 22, 1914, which is six months after presentation of the claim to the Commissioner of Internal Revenue; that the two-year statute of limitations prescribed by § 3227 of the Revised Statutes applies; that the fact that the claim was not rejected by the Treasury Department until April, 1917, is immaterial; and that therefore the suit, which was begun in July, 1918, is barred. This was the view taken by the Court of Claims for reasons theretofore given in *Kahn* v. *United States,* 55 Ct. Clms. 271. But, as we held in *Sage* v. *United States,* 250 U. S. 33, 39, the six-year statute of limitations applies to cases arising under the Act of July 27, 1912, c. 256. See also *Henry* v. *United States,* 251 U. S. 393, 394.

Motion to remand granted with directions to make new findings of fact as prayed and modify the judgment, if need be, to conform to this opinion.